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REPORTS OF CASES

DECIDED IN THE

APPELLATE COURTS

OF THE

STATE OF ILLINOIS

AT THE

OCTOBER TERM, 1897, OF THE FIRST DISTRICT; THE NOVEMBER TERM, 1898,
OF THE THIRD DISTRICT, AND THE DECEMBER TERM,
1898, OF THE SECOND DISTRICT.

WITH A TABLE OF CASES REVIEWED BY THE SUPREME COURT.

VOL. LXXXII

REPORTED BY

MARTIN L. NEWELL

COUNSELOR AT LAW

CHICAGO

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CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

THIRD DISTRICT—NOVEMBER TERM, 1898.

Jasper Dyer v. C. W. Brown and Minerva Brown.

1. **MORTGAGEE**—*In Possession—Must Account for the Rents and Profits.*—A mortgagee in possession of mortgaged premises is chargeable with the reasonable value of the use and occupation thereof.

Foreclosure, of an equitable lien. Trial in the Circuit Court of Moultrie County; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Decree for complainant; appeal by complainant. Heard in this court at the November term, 1898. Affirmed. Opinion filed February 7, 1899. Rehearing denied.

Statement of the Case.—On June the 6th, 1892, C. W. Brown and Minerva Brown, as Brown & Co., purchased from Bartlett, Kuhn & Co., their grain plant at Levington, Illinois, consisting of grain office, scales, elevator or dump cribs and bins situated on the right of way of the T. H. & P. R. R. Co., under a lease from it to them.

The consideration for the purchase was \$1,650; and Brown & Co. secured eighteen farmers and business men of Levington to assist them, to the extent of raising \$1,500 of the price paid.

The men who thus assisted Brown & Co. appointed three of their number to act as trustees for all; and they, when the bill of sale for the plant came, it being from Bartlett, Kuhn & Co. to Brown & Co., had Brown & Co. indorse thereon an assignment of the same to them as such trustees;

and they then took possession thereof and claimed to hold the grain plant as security for the \$1,500 of purchase money that had been thus put into it.

These men paid the \$1,500 as follows: \$1,000 cash and their note for \$500 due in one year. Brown & Co. were in possession when the bill of sale came; and by a verbal agreement between them, Brown & Co. were to pay all taxes, insurance and repairs on the plant, and \$300 each year thereafter, until these men were reimbursed the \$1,500.

When the \$500 note became due, the same was paid by assessments made on the eighteen men; but Brown & Co., a short time thereafter, paid that back to them. About fifteen months after the bill of sale was made, two of the trustees made an assignment on the back thereof, of all their interest therein, to Jasper Dyer, the appellant, who was the other trustee; after which assignment Dyer paid, from his own funds, seventeen-eightieths of the \$1,000 to the remaining seventeen.

Brown & Co. still continued in possession, paying all taxes, insurance and repairs, and claiming to own the plant. In the fall of 1896, Dyer instituted a replevin proceeding against Brown & Co. for the grain plant; which suit is still pending.

Since the beginning of the replevin suit Dyer has held possession of the property under a writ of replevin issued in the replevin suit, claiming to own it. Brown & Co., within fifteen months after the bill of sale had been turned over to the eighteen men, paid \$650 of the original purchase price, and all the taxes, insurance, interests and repairs on the plant.

Dyer, being in possession of the property under the replevin writ, and claiming to be the absolute owner of it, files in the Circuit Court of Coles County, this bill in equity, against the appellee, for an accounting for the use and occupation of the plant, and for general relief.

On a hearing the court found that Brown & Co. were indebted to Dyer \$406.75, and decreed payment thereof by a

Dyer v. Brown.

short day, and in default, the plant be sold to pay the same. Dyer brings the case to this court by appeal.

HARBAUGH & WHITAKER, attorneys for appellant.

E. J. MILLER and ISAAC R. MILLS, attorneys for appellees.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was a bill in equity by the appellant against the appellees for an accounting for the use of a grain elevator plant on the right of way of the railroad company at Levington, Illinois, and for general relief.

On the hearing the Circuit Court found that the appellees, Brown & Co., were the owners of the property, and that the contract by which the appellant claimed to own it, only gave him a lien thereon in the nature of an equitable mortgage to secure an indebtedness found by the court to be the sum of \$406.75, which the appellees, Brown & Co., owed him, and which amount the court decreed that they pay him within a short day, or in default thereof, that the property be sold to pay the same. From this decree the appellant prosecutes this appeal.

The principal contention of the parties to this proceeding is one of fact; the appellant claiming that he is the owner of this property, by virtue of the provisions of the original contract of sale thereof, the assignments thereon, the verbal agreements made between himself and Brown & Co., and the moneys paid by him on account of the original purchase price of the plant from Bartlett, Kuhn & Co., and insists that Brown & Co. were mere lessees of the plant and not owners thereof; while Brown & Co. claim they became the owners by purchase from Bartlett, Kuhn & Co., and never were the lessees thereof.

The evidence shows, we think, that Brown & Co. did become the owners of this property by purchase from Bartlett, Kuhn & Co., and that the arrangements made between Brown & Co. and the eighteen persons, of whom the appel-

lant was one, by which they furnished Brown & Co. \$1,500 of the \$1,650 required to purchase the property, in effect was that the eighteen men were to have an equitable lien on the property for the \$1,500 they advanced on the purchase price, and which Brown & Co. were to pay them back at the rate of \$300 each year until it was paid; and under this arrangement these eighteen men held possession of the bill of sale of this property, for the purpose of giving this lien.

We are satisfied from the evidence that the appellant succeeded to all the rights which all the other seventeen men had in this plant; and that he can enforce in a court of equity his equitable lien in the nature of a mortgage thereon by having it sold to pay the balance of this \$1,500 owing to him as their successors.

The evidence further shows that after Brown & Co. had been in the possession of this property for about four and a third years, after such purchase, the appellant replevied the same from them; and under the replevin writ had been in possession thereof when the hearing under the bill took place, for about one and two-thirds years.

The Circuit Court, therefore, properly charged the appellant, as a mortgagee in possession, with the reasonable value of the use and occupation thereof, for the one and two-thirds years; and also properly charged him for the use of some property of the appellees, shown by the evidence to have been in the possession of the appellant, and not included in the equitable lien aforesaid.

Finding no reversible error in the decree herein appealed from, we affirm it. Decree affirmed.

William L. Florville v. Leonard Stieren.

1. VERDICTS—*On Conflicting Evidence.*—Where the evidence is conflicting, it is the province of the jury to determine where the truth lies.

Assumpsit, on a promissory note. Trial in the County Court of Sangamon County: the Hon. CHARLES P. KANE, Judge, presiding. Verdict

Florville v. Stieren.

and judgment for plaintiff; appeal by defendant. Heard in this court at the November term, 1898. Affirmed. Opinion filed February 7, 1899. Rehearing denied.

E. S. ROBINSON, attorney for appellant; TIMOTHY McGRATH, of counsel.

JOHN G. FRIEDMEYER, attorney for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

This suit was brought by appellee before a justice of the peace, upon a promissory note executed to him by John Eifert and Fred G. Eifert, as principals, and William L. Florville as surety. Judgment being rendered against the defendants, an appeal was prosecuted to the County Court, where Florville interposed the defense that he signed the note as surety solely upon condition that the plaintiff would take as additional security a chattel mortgage on certain property, which the plaintiff had failed to do. A trial was had by a jury which resulted in a verdict and judgment upon the note against all three defendants for \$72.82.

The evidence in the record shows that this note and others, aggregating \$800, were executed to secure the purchase money for some dairy property sold by the plaintiff, Stieren, to the Eiferts. At the time of the sale a written agreement was executed and signed by Stieren and the Eiferts, wherein it was recited that Stieren had sold to them his dairy outfit, consisting of cows, horses, etc., for \$800, as evidenced by eight promissory notes, which were to be secured by personal security and by a chattel mortgage. Florville was not a party to that agreement, but he testified that it was agreed between him and Stieren that if he would sign the note that Stieren would take a chattel mortgage on the property. He was flatly contradicted by Stieren, who further testified that the reason that he did not take a mortgage was because Florville objected to his doing so.

In the conflict between Florville and Stieren it was the peculiar province of the jury to say where the truth was. We have no inclination to say that they decided incorrectly and

will not disturb their finding, unless we can see that some error intervened prejudicial to Florville.

It is insisted that the court erred in instructing the jury that Florville was not a party to the written agreement referred to if his signature was not attached to it, and that any agreement contained in it, not executed, would not release him as surety. There was nothing wrong in this instruction. It is contended that the court erred in refusing several instructions based upon the idea that Florville had been induced by the fraud of Stieren to sign the note. The law relating to the procurement of the execution of a promissory note by fraud and circumvention had no place in the case. The defense interposed did not involve a question of fraud, but the failure of the plaintiff to fulfill an agreement which had the effect to release the party defending from liability.

The court properly refused the request of the attorney of Florville to open and close the argument to the jury. There were no written pleadings, and the plaintiff was required to make out his case in the first instance, by the introduction of the note in evidence.

We see no reason for reversing the judgment. Judgment affirmed.

John Pollard v. Samuel Donovan et al.

1. *DEMURRER—Ruling upon, When Harmless Error.*—In a suit by executors where a plea of set-off, amenable to the statute of limitations, is filed, to which the court erroneously sustained a demurrer, but as it was the duty of the executors to interpose the bar of the statute which would have defeated the set-off, the ruling of the court on the demurrer, while erroneous, is not reversible error.

Assumpsit, on a promissory note. Trial in the Circuit Court of Vermillion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the November term, 1898. Affirmed. Opinion filed February 7, 1899. Rehearing denied.

D. D. EVANS, attorney for the plaintiff in error.

LOVE & JEWELL, attorneys for defendants in error.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was an action of assumpsit, by the defendants in error, as executors of the last will and testament of William Pollard, deceased, against the plaintiff in error, prosecuted in the Circuit Court of Vermilion County, where a trial was had by jury, and a verdict and judgment obtained by them against him for \$2,110.50.

The declaration was upon a promissory note, dated June 28, 1888, for \$1,150, payable to Mary Ann Pollard, thirty days after date, with interest at the rate of eight per cent per annum, from date until paid, and providing for an attorney's fee for collecting the same, signed by John Pollard, the plaintiff in error, and indorsed to the defendants in error by the payee named therein.

To this declaration the plaintiff in error interposed a plea of general issue, a plea of set-off, a plea of payment, a plea of want of consideration, and a plea of the statute of limitations. The defendants in error demurred to the plea of set-off, and the court sustained the demurrer over the objection of the plaintiff in error. Issue was joined on the other pleas.

The plaintiff in error brings the case to this court, and urges a reversal of the judgment of the court below, on the grounds that the Circuit Court improperly sustained the demurrer to his plea of set-off, and that the verdict is against the law and the evidence.

The evidence shows that William Pollard received from England, \$4,000, which he, in his lifetime, gave to his wife, Mary Ann Pollard, the person named as payee of the note sued on. On July 3, 1886, William Pollard died testate, and by the terms of his will he appointed the defendants in error the executors thereof, and bequeathed therein to them all his moneys, the same to be loaned out by them, and the interest accruing thereon to be paid to his widow (Mary Ann Pollard) for, and during her life, and at her death, the

money to be paid to his son, the plaintiff in error, and another son and daughter.

The executors of this will (the defendants in error) found the note sued on, among some papers in the possession of an imbecile son of the deceased, and claimed it belonged to the estate of William Pollard, deceased; the widow, Mary Ann Pollard, claimed it also, but was willing to, and did assign it to them, by her written indorsement thereon, upon their promise to pay her the interest thereafter to accrue upon the money represented by the note, during her lifetime.

The evidence further disclosed that the claim of the plaintiff in error set out in his plea of set-off, was a debt contracted verbally, to be paid him by his father in his lifetime, and which was due before his father's death, and was past due much more than five years, before suit was instituted thereon.

While on the face of the pleadings, the Circuit Court improperly sustained the demurrer to the plea of set-off, yet inasmuch as it would have been the duty of the executors to interpose the bar of the statute of limitations to this claim of the plaintiff in error, sought to be enforced by his plea of set-off, which would have defeated it, the plaintiff in error has not been injured by the ruling of the court on the demurrer; hence it appears from the whole record, that the ruling of the court on the demurrer, while erroneous, was not reversible error, forasmuch as it worked in the end, no substantial injury to the plaintiff in error.

Finding that the evidence supports the verdict and judgment rendered in the Circuit Court, we affirm its judgment. Judgment affirmed.

City of Streator v. Emily Chrisman.

1. CITIES AND VILLAGES—*Chargeable with Notice of Defects in Sidewalks.*—A city is chargeable with notice of defects in a sidewalk where the defect is of such a nature that the city authorities could, in the exercise of reasonable diligence, have ascertained its existence and repaired it.

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82 24
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City of Streator v. Chrisman.

2. *SAME—Knowledge of Defects by Injured Person.*—Although a person passing along a sidewalk knows it is out of repair, he may, notwithstanding such knowledge, recover for a personal injury occasioned by the defective walk, if he uses ordinary and reasonable care to avoid it.

Action in Case, for personal injuries. Trial in the Circuit Court of LaSalle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the November term, 1898. Affirmed. Opinion filed April 11, 1899.

P. J. LUCEY, attorney for appellant.

The exposure of person or property to injury with knowledge of the danger to which the same is exposed, is undoubtedly evidence of negligence as a matter of fact. Therefore, if a person attempts to pass over a sidewalk, bridge, or other structure, knowing the same to be in a dangerous condition, and in such attempts receives injury, his knowledge of the danger will presumptively establish contributory negligence. *Village of Clayton v. Brooks*, 150 Ill. 97; *Wakely v. Town of Boswell (Ind.)*, 48 N. E. Rep. 637.

A plaintiff, who heedlessly rushes into known danger, is guilty of such negligence as will preclude a recovery. *City of Macomb v. Smithers*, 6 Ill. App. 470; *City of Peoria v. Adams*, 72 Ill. App. 662; *City of Centralia v. Baker*, 36 Ill. App. 48; *City of Centralia v. Krouse*, 64 Ill. 19; *Blanchard v. L. S. & M. S. Ry. Co.*, 126 Ill. 416.

Although the question of negligence is ordinarily one of fact for the jury to determine, still the Appellate Court may find from the testimony, the verdict of the jury to the contrary notwithstanding, that the evidence of negligence on the part of the plaintiff is sufficient to preclude a recovery. *C. & N. W. R. R. Co. v. Sweeney*, 52 Ill. 325; *T., P. & W. R. R. Co. v. Head*, 62 Ill. 233; *C. & A. R. R. Co. v. Jacobs*, 63 Ill. 178; *C., B. & Q. R. R. Co. v. Lee, Adm'x, etc.*, 68 Ill. 576.

A party has no right to knowingly expose himself to danger and then recover damages for an injury which he might have avoided by the use of reasonable precaution. *City of*

Chicago v. Richardson, 75 Ill. App. 202; citing Lovenguth v. City of Bloomington, 71 Ill. 238.

If a person knows a sidewalk to be in a dangerous condition when he enters upon it, he can not, in the exercise of ordinary prudence, proceed and take his chance, and if he shall actually sustain damage, look to the town for indemnity. City of Chicago v. Richardson, 75 Ill. App. 202.

In an action to recover for a personal injury on the ground of negligence in the defendant, the burden of proof is upon the plaintiff, to establish either that he was in the exercise of due care, or that the injury was in no degree attributable to any want of ordinary care on his part. If he shows that he brought the injury on himself, by his own carelessness, he can not recover. Blanchard v. L. S. & M. S. Ry. Co., 126 Ill. 416; C. & A. R. R. Co. v. Gretzner, 46 Ill. 75; City of Bloomington v. Read, 2 Ill. App. 547; El Paso v. Causey, 1 Ill. App. 531.

H. H. DICUS and McDUGALL & CHAPMAN, attorneys for appellee.

A city having charge of streets is charged with the duty of keeping them in a condition reasonably safe for travel, and is bound to exercise reasonable diligence to ascertain the existence of defects and to make repairs. Mt. Vernon v. Cockrum, 59 Ill. App. 540; Pana v. Taylor, 56 Ill. App. 60.

A city is liable for injuries received where the city authorities know, or can know, by an ordinary degree of diligence, that their streets are out of repair and in a dangerous condition, and when sufficient time after notice elapses in which to make the necessary repairs before the injury is received. City of Peru v. French, 55 Ill. 317; City of Bloomington v. Bay, 42 Ill. 503; City of Joliet v. Verley, 35 Ill. 58.

Whether a city is chargeable with notice of defects in a sidewalk for a sufficient length of time before an injury to have repaired it, is a question of fact for the jury. City of Decatur v. Besten, 169 Ill. 340.

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Notice may be presumed after the lapse of such time that, by the exercise of reasonable diligence, notice might have been had. *Sterling v. Merrill*, 25 Ill. App. 596; *Salem v. Harvey*, 29 Ill. App. 483; *Chicago v. Hoy*, 75 Ill. 530; *Springfield v. Doyle*, 76 Ill. 202; *Joliet v. Seward*, 99 Ill. 267; *Chicago v. Dalle*, 115 Ill. 336; *Sterling v. Merrill*, 124 Ill. 522.

Appellee was not guilty of such negligence as would preclude a recovery simply because she went upon a sidewalk after she knew it was dangerous. *Ellis v. Peru*, 23 Ill. App. 35; *Lovenguth v. Bloomington*, 71 Ill. 238; *Aurora v. Hillman*, 90 Ill. 61; *Aurora v. Dale*, 90 Ill. 46; *City of Mt. Sterling v. Crummy*, 73 Ill. App. 572; *Joliet v. Conway*, 17 Ill. App. 577; *Osborne v. Detroit*, 32 Fed. Rep. 36.

Although a person goes upon a sidewalk knowing it to be out of repair, recovery may be had for the injury received if ordinary and reasonable care has been used. *City of Chicago v. Fitzgerald*, 75 Ill. App. 174; *City of Flora v. Naney*, 136 Ill. 45.

The use of a sidewalk, with knowledge of its dangerous condition, may be evidence of negligence, but it is not negligence as a matter of law. *Owen v. City of Chicago*, 10 Ill. App. 465; *City of Springfield v. Rosenmeyer*, 52 Ill. App. 301; *City of Chicago v. Fitzgerald*, 75 Ill. App. 174; *City of Sandwich v. Dolan*, 141 Ill. 430; *Village of Clayton v. Brooks*, 150 Ill. 97.

Whether or not appellee was in the exercise of ordinary care for her own safety, under all the circumstances, was a question of fact for the jury. *Mechanicsburg v. Meredith*, 54 Ill. 84; *Lovenguth v. Bloomington*, 71 Ill. 238; *Railroad Co. v. Bonifield*, 104 Ill. 223; *Pennsylvania Co. v. Frana*, 112 Ill. 398; *Chicago v. Keefe*, 114 Ill. 222; *Railroad Co. v. Hutchinson*, 120 Ill. 587; *Pomfrey v. Village*, 104 N. Y. 459; *Cullom v. Justice*, 59 Ill. App. 304; *Virginia v. Plummer*, 65 Ill. App. 419; *Cullom v. Justice*, 161 Ill. 372.

MR. JUSTICE HIGBEE delivered the opinion of the court.

Appellee, while walking along a street of the city of Streator toward her home, about ten o'clock at night on

August 7, 1897, was tripped by a loose board in a sidewalk which was stepped upon by a companion with whom she was walking, and thrown down, receiving injuries to her back, shoulder and hand, for which she sued the city and recovered a verdict for \$1,000. A judgment was entered by the court for that amount and the city appealed therefrom to this court.

It was shown by the evidence, and is not questioned, that the boards in the sidewalk were loose at the time and place in question, and that appellee, by reason of such defect in the walk, received a fall and suffered certain injuries. It was contended, however, that the defect had not existed for such a length of time, nor was it of such a nature as to charge notice thereof upon the city, and most of the evidence in the case was introduced upon that question.

Four witnesses, including appellee, swore positively that they passed over the walk frequently and that the boards were loose for from two to four weeks prior to the accident; on the other hand some eight witnesses introduced on the part of appellant testified that they had used the walk often during said time and never noticed any loose boards, and one other witness for appellant said he noticed the loose boards on the day of the accident but not before. None of them, however, would swear positively there were no loose boards before that time, though the section foreman who had charge of the railroad crossing at the place where the accident occurred, testified that he examined the walk in question a week before the accident and could then discover no loose boards. While the evidence is not conclusive, we think it sufficient to justify the jury in finding that the defect had existed for a sufficient length of time and was of such a nature that the city could, in the exercise of reasonable diligence, have ascertained the existence of the defect and repaired it.

It is contended that appellee knew of the defect in the walk and was therefore guilty of contributory negligence in going upon it.

Although a person passing along a sidewalk may know

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it is out of repair, he may, notwithstanding such knowledge, recover for a personal injury occasioned by the defective walk, if he uses ordinary and reasonable care. *City of Flora v. Naney*, 136 Ill. 45.

Whether due care was exercised in using a sidewalk knowing it to be out of repair, is a question of fact for the jury. *Village of Cullom v. Justice*, 161 Ill. 372.

The instructions given on both sides fairly presented the law governing the case to the jury. We can not say that their verdict was clearly unwarranted by the evidence, and we are therefore not disposed to disturb it.

We would have been better satisfied had the damages been assessed by the jury at a smaller amount, but they are not sufficiently large to warrant a reversal on that account alone, and the judgment of the court below will be affirmed.

Mary Tompson v. Almira E. Wilson et al.

1. **LEGACIES—When Deemed in Satisfaction of a Debt.**—Where a legacy is given to a creditor, it is deemed a satisfaction of the debt in cases where it is equal to or greater in amount than the debt, of the same nature, certain, and not contingent, and if there appear to be no particular motive for the gift.

Bill to Construe a Will.—Trial in the Circuit Court of Pike County; the Hon. JOHN C. BROADY, Judge, presiding. Decree for complainant. Appeal by defendant. Heard in this court at the November term, 1898. Reversed and remanded. Opinion filed February 7, 1899. Rehearing denied.

W. L. COLEY, attorney for appellant.

A legacy to a creditor, equal to or greater in amount than an existing debt, certain and not contingent, and of the same nature, where the debt was contracted before the bequest was made, and no motive is assigned for the gift, is deemed in equity a satisfaction of the debt. But no presumption of satisfaction arises where the legacy is of less amount than the debt, contingent, uncertain, or of a differ-

ent nature, either as to subject-matter or interest; nor where there is a difference in the times of payment of the debt and legacy, or the debt is upon an open and running account or unliquidated demand. 13 Am. and En. Ency. 82; Fetrow v. Kraus, 61 Ill. App. 238.

Generally a will is not to be construed by anything *dehors*, where there is no latent ambiguity, and parol evidence is not admissible to show the intention of the testator against the construction on the face of the will, and the state of his property can not be resorted to, to explain the intention. Heslop v. Gatton, 71 Ill. 531; Wentworth v. Read, 61 Ill. App. 542; Brooks v. Brooks, 65 Ill. App. 332; Tole v. Hardy, 6 Cow. 333; Kurtz et al. v. Hibner, 55 Ill. 514.

A latent ambiguity in a will, which may be removed by extrinsic evidence, may arise, first, either when it names a person as the object of a gift or a thing as the subject of it, and there are two persons or things that answer such name or description, or, second, when the will contains a misdescription of the object or subject, as where there is no such person or thing in existence, or if in existence, the person is not the one intended, or thing does not belong to the testator. Patch v. White, 117 U. S. 210. (Cited and approved in Whitcomb v. Rodman, 156 Ill. 121.)

EDWARD DOOCY, attorney for appellees.

The fundamental rule in the construction of wills is, that the intention of the testator, if not inconsistent with some established rules of law, must control. Crerar v. Williams, 145 Ill. 625.

In the construction of a will, the court will put itself as far as possible in the position of the testator at the time of the execution of the will. Snyder v. Warbasse, 11 N. J. Eq. 446; Leigh v. Savidge, 14 N. J. Eq. 124; Smith v. Wells, 7 Met. (Mass.) 240; Popkin v. Sargent, 10 Cush. (Mass.) 327; Smith v. Bell, 6 Pet. (U. S.) 68; Peters v. Spillman, 18 Ill. 370; Deeker v. Deeker, 121 Ill. 341; Bingel v. Voltz, 142 Ill. 214; Wicker v. Ray, 118 Ill. 472.

It is always competent to consider the attendant facts

and circumstances from which an intention to give or not to give may be inferred. *Current v. Fago*, 1 Collier's Chancery, 262; *Ebrand v. Dresser*, 2 Ch. Cases, 26; *Capek v. Kropek et al.*, 129 Ill. 576.

In general, where a legacy is given to a creditor it is deemed a satisfaction of the debt if is equal to or greater in amount than the debt, of the same nature, certain, and not contingent, and if there appear to be no particular motive for the gift. *Fetrow v. Kranse*, 61 Ill. App. 235.

The general rule as stated by Sir J. Trevor, master of the rolls, in the leading case of *Talbot v. Duke of Shrewsbury*, is as follows: "If one being indebted to another in a sum of money, does, by his will, give him a sum of money as great or greater than the debt, without taking any notice of the debt, this shall, nevertheless, be in satisfaction of the debt, so that he shall not have both the debt and the legacy." *Pomeroy's Eq. Jur.*, Sec. 527; *Strong v. Williams*, 12 Mass. 389; *Roper on Legacies*, Secs. 1025, 1052; *Chancey's Case*, 1 P. Wm. 408; *Reynolds v. Robinson*, 82 N. Y. 103.

A legacy exactly corresponding in amount and time of payment to an existing debt of the testator to the legatee, and given by a will which contains no provision indicating a different intention, is to be presumed to be in satisfaction of the debt and not in addition thereto. *Allen v. Merwin, et al.*, 121 Mass. 378; 2 Story on Eq., Jur. 1109, 1119, 1120.

MR. JUSTICE WRIGHT delivered the opinion of the court.

This was a bill in equity filed by appellees against appellant to construe the will of Andrew Wilson, deceased, in several respects. The only point involved upon this appeal is the clause of the will by which appellant is bequeathed the sum of \$500. It appears from the evidence that appellant and her cousin Sarah, were taken in early life by the testator, Wilson, appellant eleven months and Sarah eight years old, and brought up to womanhood, they being nieces of the deceased. Appellant's father left \$2,000 in life insurance, of which the net one-sixth share, \$285, belonged to her. The deceased, Andrew Wilson, was appointed guard-

ian for appellant, received the money for her as such, had it fourteen years, and died before appellant was eighteen years of age. The deceased never made any inventory or rendered any account to the County Court of his guardianship during his lifetime. After the death of Andrew Wilson, the appellee, Almira E. Wilson, his widow, as executrix, made settlement with appellant for the money due from the testator as guardian, and paid to her on account of such guardianship the sum of \$300 in full of that claim. The purpose of the present bill, so far as it affected appellant, was to obtain a construction of the will to the effect that the \$500 legacy given to her by the will of Andrew Wilson was intended by the testator as payment of his obligation to her as guardian, and the court so decreed, and directed that the \$300 paid to appellant by the appellee, Almira E. Wilson, in settlement of the guardianship of the testator, be applied upon the legacy contained in the will, leaving as bounty the sum of \$200 only, from which decree appellant prosecutes this appeal.

The debt due from the deceased, being of a fiduciary character, and for which he was legally bound to account in the County Court, was not of that nature of indebtedness to which the law sometimes attaches a presumption that it was the intention of the testator to pay by a legacy in his will in favor of his creditor, and the will in this case is otherwise wholly silent upon this subject. The oral proof admitted by the court explanatory of this point, if admissible at all, when fairly considered, rather tends to sustain the positive provision of the will that the legacy was intended as a gift. The contention of appellee is that it is the general rule that where a legacy is given to a creditor, it is deemed a satisfaction of the debt, if it is equal to or greater in amount than the debt, of the same nature, certain, and not contingent, and if there appear to be no particular motive for the gift. While, for the purposes of this case, it may be conceded that such is the law, still such a law can have no application here, for it can not be claimed there was any similarity either in the amount or nature of the legacy with the debt due to appellant, and there was a particular

motive for the gift to her. Had the testator made an accounting to the County Court, as by law he was required to do, it would have appeared that the sum he owed to her as guardian was much greater than the amount of the legacy, in which case the legal presumption, so much relied upon by appellee, that the legacy was intended as a payment merely of such debt, would thereby be rebutted. There was no evidence tending to show that the testator ever designed charging the girl for her maintenance or education, and the circumstances rather rebut that inference, and besides, such matters being peculiarly within the province of the County Court to determine, strong reasons should exist before a court of equity would be warranted in interposing, and that, too, at the instance of the party, or his representative, who is in default.

A settlement was made with the young woman by the representative of the estate, out of court, without legal advice as to her rights, and \$300 paid to her in full of her claim against her guardian, of which she does not now complain; and at this time, the evidence shows, she was informed the will contained a clause giving her \$200 only, when in fact that was a mistake. The settlement of the guardianship matter had no relation with the provisions of the will, and it was so understood by all the parties at that time, and we can not understand how the decree of the court can be maintained wherein it declares that \$300 of the \$500 bequeathed to appellant was intended by the testator as a payment of that amount owed by him to appellant.

We are of the opinion the decree of the Circuit Court is erroneous, and it will be reversed and the cause remanded.

Chicago & Alton Railroad Co. v. Alexander Pettigrew.

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1. MASTER AND SERVANT—*When Necessary to Warn the Servant of Risks.*—It is not necessary that a servant should be warned of every possible manner in which injury may occur to him, or of risks that are as obvious to him as to the master.

2. *SAME—Duty of Master to Point Out Dangers.*—The master is not required to point out dangers which are as readily discoverable by the servant himself, by the use of ordinary care, with such knowledge, experience and judgment as the servant actually possesses, or as the master is justified in believing him to possess.

3. *SAME—Obligations to Take Care of the Servant.*—The master is under no more obligation to take care of the servant than the servant is to take care of himself.

Action in Case, for personal injuries. Trial in the Circuit Court of McLean County; the Hon. JOHN H. MOFFET, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the November term, 1898. Reversed and remanded. Opinion filed December 2, 1898. Rehearing denied.

WM. BROWN, general solicitor, and A. E. D'MANGE, attorneys for appellant.

SAMPLE & MORRISSEY, attorneys for appellee.

MR. JUSTICE WRIGHT delivered the opinion of the court.

Appellee sued appellant in an action on the case for negligence, and recovered a verdict and judgment for \$1,500, from which the latter has appealed to this court.

The declaration in substance charges that on August 7, 1897, the appellee, being young and inexperienced in the use of machinery, and having been employed in the shops of appellant as helper, was directed to cut bolts from the boiler of a locomotive with a machine called compressed air nippers, the same being operated by force of compressed air; that appellant, knowing his inexperience, gave no instructions concerning the operation, or warning as to any danger in the use of such machine; that in fact the operation of the machine caused the pieces of bolts cut off by it to be thrown in various directions, and they could not be seen or avoided; that no guard or fender was provided or attached to the machine to prevent the ends of bolts so cut off from striking the operator, and that while appellee was operating the same with due care, being ignorant of the use thereof, one of the bolt ends struck and put out an eye.

The material facts appearing on the trial are, in substance, that appellee, to obtain employment in the service of

appellant, falsely represented his age to be twenty-one years, after which he occupied the position of helper in the shops of appellant, for the period of sixteen months, and until he was hurt. At the time of the trial appellee was past twenty-one years of age, and appears to be a bright and intelligent young man. The machine he was directed to use had been in use in the shops for four months before the accident, and is what its name implies—nippers, operated by compressed air, equal to the force of 30,000 pounds pressure, applied by the movement of lever or handle. The practical operation of the machine is simple and easily understood, but requiring care and exactness in placing the knives of the nippers to the neck of the bolt previous to applying the force. It is but reasonable to infer that after its having been in the shops four months, during which time 5,000 bolts were cut with it, any ordinary person in the shops, interested in the kind of work done there, would understand or become acquainted with the principles of its operation. If the knives of the nippers are placed with their center on the center of the bolt to be cut, and the air applied, the nippers close and the bolt is cut, the piece flying straight backward, and thence to the ground. Should the air be applied when the center of the knives are below the center of the bolt, the piece cut off will fly upward and outward; if set above the center of the bolt the piece will fly outward and downward, but in neither case will it fly to the right or left. It seems that the force of this machine, when applied for the purposes of cutting a bolt, will have the same effect in propelling the detached piece as an equal force applied upon a chisel by means of the blows of a sledge or hammer, at either boiler, anvil or other place. A guard or fender would have destroyed the use of the machine, and there is no complaint the nippers were not perfectly constructed as such, and in good repair.

It is first insisted by counsel for appellant that the false statement by appellee concerning his age, by which he brought about the relation of master and servant, should in legal effect deprive him of all remedy for the injury alleged

to have occurred to him. If by means of a falsehood he entered a dangerous service, he now ought to be denied redress for injuries received in such service. We are unwilling to apply such doctrine to the facts of the case. If it be true that appellee, by means of deception and fraud, entered the service of appellant, that would be no excuse for negligence on its part, if such negligence resulted in injury to appellee.

The other principal grounds urged by counsel for appellant in support of their assignment of errors, are that the verdict is against the weight of the evidence, and that the court gave improper instructions to the jury. The specific negligence charged in the declaration, other than that there was no guard or fender, is that appellant gave appellee no instructions concerning the operation or working, as to any danger in the use of the machine. From the evidence in the case, we are unable to understand why a person of ordinary intelligence, such as appellee was, if he knew how to operate the machine, which the evidence also shows he did, could not readily discover for himself, where the danger was in such operation, and by the use of ordinary care avoid it. Appellee had already cut sixteen or eighteen bolts before he was injured, and must, if he used proper care, have known where the bolts went when cut off. Besides, ordinary men well know the effect of force applied in any manner with sufficient power to sever an iron or steel bolt of the size used in steam boilers. All know the effect will be to cause the unconfined part to fly off, and in the opposite direction to the force applied to it, and that it would be perilous to get in the way of the flying particle. The result of such force, although not so potent, is as certain and inevitable as the explosion of powder behind the projectile in a gun. Every ordinary person in the use of due care for his own safety will avoid placing himself in the way of such dangers. Had appellee stood at the side of the machine instead of the front, or as it is described in the evidence, behind it, he would not have been subjected to hazard.

It is the settled and elementary law that it is not necessary

that a servant should be warned of every possible manner in which injury may occur to him, nor of risks that are as obvious to him as to the master. The master is not required to point out dangers which are as readily discoverable by the servant himself by the use of ordinary care, with such knowledge, experience and judgment as the servant actually possessed, or as the master is justified in believing him to possess. *Shear. & Red. on Neg.*, Sec. 203 and notes. The master is under no more obligation to take care of the servant than the servant is to take care of himself. We think the appellee failed to prove, by the weight of the evidence, the negligence averred in the declaration.

Some of the instructions given by the court to the jury at the instance of the appellee, of which complaint is made, we think were erroneous and misleading. To instance in this regard, the fourth and fifth instructions inform the jury that the master is required to exercise reasonable care to see that the machinery provided is reasonably safe, and the servant has the right to rely upon the discharge of such duty in the absence of knowledge to the contrary. It may be these instructions contain correct and elementary law, but it is abstract merely, with no application to the issues tried. The real issue made upon the declaration was, whether the servant had been, or was informed, by the master or otherwise, of the danger in the use of the machine, not whether the master had used reasonable care in furnishing a safe one. The evidence we think shows that a fender or guard would destroy the use of the machine altogether, and the declaration is otherwise upon the theory that the machine was perfect of its kind, and with knowledge of the dangers incident to its use, that it was safe. Instructions, like the evidence, should be confined to the issues made by the pleading, otherwise they mislead the jury. Under these instructions, the jury might well have found that appellant had failed to use reasonable care to furnish a safe machine, when, if appellee was entitled to a verdict at all, the jury must find that appellant was negligent in failing to warn appellee of the dangers incident to the use of the machine. The evidence upon this

latter issue, as we have seen, was at most conflicting, which furnishes an additional and strong reason why the instructions should be accurate and confined to the issues presented by the declaration.

For the errors indicated the judgment of the Circuit Court will be reversed and the cause remanded.

CASES

IN THE

APPELLATE COURTS OF ILLINOIS

FIRST DISTRICT—OCTOBER TERM, 1898.

82 39
1898-99

Liquid Carbonic Acid Manufacturing Co. v. Adolph Con- vert, Israel Cowen and Maurice M. Houseman.

1. **MALICIOUS PROSECUTION—Attorneys, When Liable.**—If an attorney who commences a suit knows that there is no cause of action, and dishonestly, with some sinister view and for some purpose of his own, or for some other ill purpose which the law calls malicious, causes a person to be arrested and imprisoned, he is liable to respond in damages.

2. **SAME—Application for the Appointment of a Receiver.**—An action for malicious prosecution will not lie against parties who, without probable cause, make an application to a court of chancery for the appointment of a receiver.

3. **ABUSE OF LEGAL PROCESS—Distinction Between Malicious Use and a Malicious Abuse.**—There is a distinction between a malicious use and a malicious abuse of legal process.

Malicious Prosecution.—Trial in the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Judgments for the defendants on demurrer. Appeal by plaintiff. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed March 14, 1899.

WILBER, ELDRIDGE & ALDEN, attorneys for appellant, contended that an action will lie for the malicious prosecution of a civil suit, or the malicious prosecution of an application for a receiver, and especially when it is made for the purpose of destroying credit, which is a property right; see the following: Newell on Malicious Prosecution, Chap. I, Secs. 26, 27 and 28; Payne v. Donegan, 9 Ill. App. 566;

 VOL. 82.] Liquid Carbonic Acid Mfg. Co. v. Convert.

Woods v. Finnell, 13 Bush. (Ky.) 629; 17 Am. Law. Reg. (N. S.) 689; Cox v. Taylor, 10 B. Mon. 17; Brown v. Cape Girardeau, 90 Mo. 377; Closson v. Staples, 42 Vt. 209; 1 Am. Rep. 316; Eastin v. Bank of Stockton, 66 Cal. 123; 56 Am. Rep. 77; Whipple v. Fuller, 11 Conn. 582; Stone v. Stevens, 12 Conn. 219; McCardle v. McGinley, 86 Ind. 538; 44 Am. Rep. 343; Pangburn v. Bull, 1 Wend. (N. Y.) 345; Marbourg v. Smith, 11 Kan. 554; Allen v. Codman, 139 Mass. 136; Pope v. Pollock (Ohio), 21 N. E. Rep. 356; O'Neill v. Johnson (Minn.), 55 N. W. Rep. 601; Antcliff v. June (Mich.), 45 N. W. Rep. 1019; Stewart v. Sonneborn, 98 U. S. 187; Biering v. First Nat. Bank, 69 Tex. 599; 7 S. W. Rep. 90; Lipscomb v. Schofner (Tenn.), 33 S. W. Rep. 818; Smith v. Burrus (Mo.), 16 S. W. Rep. 881; McPherson v. Runyon, 43 N. W. Rep. 392; 41 Minn. 524; Savill v. Roberts, 12 Mod. 208; Potts v. Imlay, 1 South. (N. J.) 330.

Where the declaration alleges such facts as show that there was a collateral or ulterior purpose, for maliciously and without probable cause, prosecuting the application for a receiver, such as to amount to an abuse of court procedure, it is not necessary to allege that the former action has been finally determined in favor of the plaintiff. See, Sneed v. Harris, 13 S. E. Rep. 920; 109 N. C. 349; Granger v. Hill, 33 E. C. L. 675; 4 Bing. (N. C.) 212; Prough v. Entriken, 11 Penn. St. 81.

COWEN & HOUSEMAN, attorneys for appellees.

It is well settled that at common law no action will lie against one for bringing a civil suit, however malicious or unfounded, unless the body of the party is arrested or imprisoned or holden to bail; in all other cases the costs a party recovers are supposed to be an adequate compensation for the damages he has sustained: Swift's Digest, Vol. 1, p. 492; Espinasse's Nisi Prius, 525; 1 Bac. Abr. 96; 2 Chitty's Pl. 601, notes h and k; and we have ample American authorities for sustaining the English rule: Ray v. Law, Pel. C. Ct. 207; Woodmansie v. Logan, Pen. (N. J.) 93; Parker v. Frambs, Pen. (N. J.) 156; Cade v. Yocum, 8 La. Ann. 477; Gorton v. Brown, 27 Ill. 493.

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An action can not be maintained against an attorney for bringing a civil suit unless he has commenced such suit without the authority of the party in whose name he sues, or unless there is a conspiracy to bring a groundless suit, knowing and understanding it to be groundless and without any intent or expectation of maintaining the suit. *Bicknell v. Dorion*, 33 Mass. 478. See on this subject, *Peck v. Chouteau*, 91 Mo. 138; *Burnap v. Marsh*, 13 Ill. 538, which is as far as courts go on the subject. *Newell on Malicious Prosecution*, Sec. 19, p. 25.

If attorneys can not act and advise freely, without constant fear of being harassed by suits and actions at law, parties could not obtain their legal rights.

The malice of the client does not render the attorney liable. *Newell on Malicious Prosecution*, Sec. 19, p. 25.

The action for malicious prosecution to recover damages for a private wrong, that is, for the institution of a civil suit with malice and without probable cause, is governed by the same rules of law as the action where the prosecution complained of is of a criminal character. *Lawrence v. Hagerman*, 56 Ill. 68; 21 Amer. Law Register, 281; *Newell on Malicious Prosecution*, Sec. 19, *et seq.*; *Collins v. Hayte*, 50 Ill. 353.

An action for malicious prosecution of a civil suit will not lie until the final termination of the suit, and the complaint must allege a want of probable cause by averring that the suit was finally determined in favor of the defendant therein. *Bird v. Lime*, 1 Com. 190; *Fisher v. Bristow*, 1 Doug. 215; *Patsum v. Marshall*, Sayer, 162.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

This is an action for malicious prosecution. The declaration alleges that the defendant Convert had been formerly employed by the plaintiff corporation as one of its superintendents, and was discharged for insubordination and fraud; that thereupon he organized a rival company, and then, for the purpose of injuring the good name and credit of the

plaintiff, and "to have said plaintiff adjudged insolvent and wholly ruin said plaintiff," made an application for the appointment of a receiver to wind up its affairs as an insolvent corporation, and made an affidavit that the plaintiff was in an insolvent condition, about to dispose of its assets. The other defendants are charged with having conspired with Convert for the purposes aforesaid, and with having advised and procured the action complained of. It is averred that a hearing of the application for a receiver was had upon affidavits filed in support thereof, that thereupon the application for a receiver was denied, and the prosecution of such application then and there abandoned. It is not alleged that the suit in which the application was made, has been determined. Apparently it has not been.

The declaration was demurred to generally and specially, and the demurrer having been sustained, the plaintiff elected to stand by its declaration. The suit was dismissed and plaintiff appeals.

So far as defendants Cowen & Houseman are concerned, the declaration does not state facts indicating malice or sustaining the charge of conspiracy. It contains the bare averment that they conspired with Convert to injure the plaintiff, and destroy its credit. The only fact alleged is that they advised and procured Convert to apply for a receiver and to make an affidavit to the effect that plaintiff was insolvent, without any reasonable or probable cause.

This is not sufficient. Facts must appear from which malice and bad faith can be inferred in order to sustain the averment. The statement that they conspired with Convert is a statement of a conclusion. That they advised Convert to proceed as he did does not necessarily imply malice; nor does the averment that they knew, as the declaration alleges they did, that the plaintiff had never been insolvent, based upon any statement of fact implying such knowledge, or from which it can be inferred they possessed or had the opportunity to acquire it. No ulterior or collateral purpose implying malice on the part of Cowen & Houseman appears. In *Burnap v. Marsh*, 13 Ill. 536, 538, the court, by Mr. Justice Caton, said :

"The rule by which attorneys may be held liable for malicious prosecutions is clearly laid down by Tindal, C. J., in *Stockley v. Harnidge*, 34 Eng. C. L. R., 276. It was there held that if the attorneys who commenced the suit alleged to be malicious, knew that there was no cause of action, and knowing this, 'dishonestly and with some sinister view, for some purpose of their own, or for some other ill purpose which the law calls malicious, caused the plaintiff to be arrested and imprisoned,' they were liable."

In that case there had been an arrest, and the declaration showed the suit in which the arrest occurred had been, upon hearing, dismissed. We are of opinion that the declaration states no cause of action against Cowen & Houseman.

Appellant contends that the action will lie for the malicious prosecution of an application for a receiver, when made for the purpose of destroying credit. Reference is made to the opinion of Mr. Justice McAllister in *Payne v. Donegan*, 9 Ill. App. 566, in which it was said that while not prepared to hold that a defendant in every civil suit where there was no arrest of his person or attachment of his goods, could, upon the mere allegation that the suit was brought maliciously and without any reasonable or probable cause, maintain an action on the case against the plaintiff as for malicious prosecution, yet where the case shows some special grievance, the action would lie. That was a case where the declaration showed unlawful acts by the defendants and actual and legal damages sustained by the plaintiff as a proximate result. It was a case where there had been an abuse of legal process.

No such abuse is shown by this declaration. Except that it is charged to have been malicious, the declaration shows only a regular proceeding—a bill filed and an application for a receiver thereunder; no abuse of legal process appears from the averments. In *Gorton v. Brown*, 27 Ill. 488, it is said that actions for damages for so bringing suit are not favored by the courts, and ought not to be, for the reason that it would tend to encourage successful defendants to bring actions for malicious prosecution in cases where no warrant therefor exists.

It is urged that special damages were suffered in this case. But of these damages, injury to credit is, in the declaration, stated to have resulted from the publication of the fact that an application for a receiver had been made—not from the application itself, which the court denied. The expenses of litigation are incident to the suit, and this appears to be still pending.

Counsel contends that it is not necessary the declaration should allege that the suit complained of has been determined; that it is enough if the declaration shows the real purpose of the malicious suit to be, not the appointment of a receiver, but to ruin the credit of appellant.

In this case the damages alleged are consequential, not direct. The application for a receiver did not involve any seizure of property nor arrest of person. Cases, therefore, where there had been such malicious seizure or arrest, are not in point.

It does not necessarily follow, because the preliminary application for a receiver has been denied or abandoned, that it may not be renewed upon evidence produced in the further prosecution of the pending suit.

Upon the facts stated in this declaration, the court can not say that no cause of action exists, or that no cause existed for such application, until that suit itself is disposed of. Until so disposed of, we can not know that the action complained of was not brought in good faith, without trying the issues involved therein.

The gist of the declaration as stated by appellant is, "that appellees, together, made a malicious application for a receiver without probable cause." Granting that this might afford a right of action, the want of probable cause can not be presumed while the suit in which the application is made is still pending. There is a distinction between a malicious use of legal process and a malicious abuse. It is clearly settled that in the former case, "the proceeding in which it is claimed the process has been maliciously used must have been determined before any action for the injury lies." Newell on Malicious Prosecution, Sec. 7.

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The declaration in this case does not make out a case of abuse of legal process. For aught that appears, the appellee Convert may have had some claim against appellant which he had a legal right to prosecute. He may have been actuated by malice, and may have been willing to injure appellant's credit and reputation, but if he had probable cause to maintain an action, the fact alone that he proceeded from malicious motives is not enough to justify this suit. Both malice and want of probable cause must exist, though malice may be inferred from want of probable cause. *Le Clear v. Perkins*, 103 Mich. 131-141.

For the reasons indicated the judgment of the Circuit Court must be affirmed.

Illinois Steel Company v. Michael Richter.

1. *LIMITATIONS—Declaration and Additional Count—What is Not a New Cause of Action.*—Where a declaration states as a cause of action, the placing "the hoisting engine in the care, management and control of an unfit, incompetent and unskillful person, by means whereof," etc., an additional count in which the adjective "unlicensed" is added next after the words "unskillful and incompetent," is not a statement of a new cause of action.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed March 30, 1899.

KEMPER K. KNAPP, attorney for appellant; ELBERT H. GARY, of counsel.

WORTH E. CAYLOR and WILLARD GENTLEMAN, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

This was an action on the case by appellee against appellant for an injury to the person alleged to have been occa-

sioned by appellant's negligence. The declaration, including an original and amendments thereto, contained six counts, but the case was tried on the last count only, filed February 24, 1898. In this count it is averred, in substance, as follows: Defendant, January 30, 1896, was possessed of and using a rail mill in the city of Chicago, and plaintiff was employed by defendant as a common laborer in and about a heating furnace in the mill. There was in the mill a hoisting apparatus and steam engine for the hoisting of large metal ingots of great weight, which ingots were hoisted by means of hooks or tongs. There was at said time an ordinance of the city of Chicago, which prohibited any person from taking charge of, managing or operating any steam engine or boiler, or any portion of a steam plant, in the city of Chicago, unless duly licensed so to do, under a penalty of not less than \$20 nor more than \$50 for each offense; and also imposing a penalty on any person, agent, firm, company or corporation, owning or controlling any steam engine, boiler, or steam plant, who should authorize or permit any unlicensed person to have charge of, manage, or operate the same, the penalty being not less than \$50, nor more than \$200 for each day's violation of the ordinance. Plaintiff was ordered by the foreman to work at the hoisting apparatus, and to fasten or hook the tongs about the ingots, for the purpose of hoisting them. It was defendant's duty to provide for plaintiff a safe place in which to work, the proper tools and appliances, and to have the steam engine under the care and management of a competent and skillful engineer; yet, plaintiff being in the exercise of reasonable care, defendant failed to provide for him a safe place to work, "and did then and there have said steam hoisting apparatus under the care and charge of an unskillful and incompetent and unlicensed engineer, contrary to the ordinance aforesaid, and not acquainted with the operation and manipulation of the same, and thereby, through the negligence, carelessness and improper conduct of the defendant in this behalf, a certain ingot of iron and steel, of great weight, to wit, of the weight of 1,600 pounds, then and there being hoisted," etc., fell on the plaintiff, etc.

The defendant pleaded the general issue, and the statute of limitations, to which latter plea a demurrer was sustained. The jury found for the plaintiff and assessed his damages at the sum of \$8,000 and judgment was entered on the verdict.

It will be observed that the only breaches of duty alleged are failure to provide a safe place for plaintiff to work and the employment of an unskillful, incompetent and unlicensed engineer. There is no evidence that the place where appellee worked was an unsafe place for one exercising ordinary care. The only questions, therefore, are, whether the accident occurred by reason of any unskillfulness, incompetence, carelessness or mismanagement of the person operating the engine by means of which and the apparatus connected with it, the ingots were hoisted, and whether such person was unskillful, incompetent, etc. Appellee worked for appellant nine years, and at the time of the accident had been working two years at hoisting ingots. The ingots were hoisted for the purpose of piling them on the floor. They were sometimes piled fourteen feet high. The manner of hoisting, so far as the same appears from the evidence, was as follows: There was an upright derrick and a crane extending out from it. There was a cable attached to a drum on the engine which extended out to the end of the crane and was there attached to a heavy pair of iron tongs. At the lower end of each arm of the tongs there was a hole. Through each hole a point was inserted. When it was sought to hoist an ingot the men would bring the pair of tongs with these points in them together on the ingot, when a signal would be given to the engineer, who was in a shanty about sixty or seventy feet away, to hoist, who, in obedience to the signal, would apply the steam and the ingot would ascend. The tongs operated as do ice tongs. The men had long iron hooks for the purpose of pulling the ingots around when they were in the tongs and hoisted from the ground, and when they were too high to reach conveniently by the hooks, a rope attached to the crane was used, by means of which the ingot would be swung around as desired.

The accident happened between one and two o'clock p. m., June 30, 1895. There were six men altogether, engaged in the work of hoisting ingots. Nick Sobieski was at the engine sixty to seventy feet distant from the place where the tongs were attached to the ingots. Five others, of whom the appellee was one, were engaged in placing the tongs on the ingots. One of these five was Joe Nieman, called by appellee his partner, whose duty it was to give signals to Sobieski to hoist or to stop the engine as might be required. Appellee and Martin Drapinski attached the tongs to an ingot about 4½ feet long by 16 to 18 inches square and about 2,000 pounds in weight. Appellee says that he and Drapinski then walked away quite a distance from the ingot to give Sobieski a chance to raise it and the signal was given to hoist it. The appellee states as his reason for moving away, "We walked away, so when he takes the ingot up and jerks it, it would not swing and something would not happen." Nieman, appellee's partner, says: "As they hooked the tongs on they walked away, and I give him the signal to hoist up."

In his examination in chief, appellee thus describes the accident:

"The day I got hurt we worked that forenoon and the afternoon, working and lifting the ingots and putting them away, and he took it and he raised the ingot about three feet, and as he raised the ingot it was caught at the other ingots that was along side of it, and he was jerking it with the derrick, and my partner gave him a signal to stop and he stopped, and I went up and got hold of the ingot and commenced pulling it up and down, trying to loosen it. As I was loosening it the iron jerked up and then it dropped."

On cross-examination he testified:

"We walked away from the ingot before the engine was started to tighten the cable. We would put the tongs on first and then walk away, and then he would just take and raise it up. Just as soon as we would walk away, then Nieman would give the signal to the engineer to raise it up. This ingot had been raised just before the accident about three and a half feet. It caught at one end on another ingot. The tongs were attached to the ingot that fell, in the mid-

dle. The ingot went up until it could not go any further, and then it got caught, and then it commenced to jerk, and then he told him to stop. When it started to go up, the ingot arose in a horizontal position. One end of the ingot caught on those ingots piled up there.

Q. Did the ingot then stop? A. It was jerking then.

Q. Well, then, did it stop? A. Then Nieman gave him the signal to stop.

Q. Then did it stop? A. Yes, sir.

Q. Then what did you do? A. I went up and got hold of it and stood up away from it.

The Court: He says he stood up.

The Witness. Yes, sir; I went up to it and catch it far away, and put my hands on it to loosen it, and it jerked and it fell."

John Walinski testified:

"Mike Richter and Martin Drapinski put the tongs on and it was raised up about three feet or three feet and a half by steam, and then Nieman gave Sobieski, the man that was running the engine, a signal to stop. He could not get the ingot up for another lay on top of that. It was not right on top. It was nearly a little over on one side. Then Richter went up and was going to swing the ingot around, and as he done that, why the ingot fell. I was about ten feet from the ingot when it fell. I was watching the ingot all the time. After Richter took hold of it the ingot jerked up a little and then fell on Richter's leg. It jerked once."

Martin Drapinski, who helped appellee to fasten the tongs to the ingot, testified:

"The ingot was drawn up three feet, then it fell down. Richter came up to it and wanted to turn it to one side, and just then it fell down. He wanted to get it away from among the others, for Nick Sobieski could not pull it out. I mean the engine could not pull it out. I did not take hold of it. I was standing about eight feet from Richter. I was watching the ingot all the time. Nieman was standing by me. I don't know what he was doing, for I was watching Richter coming with the ingot. Nieman's business there that day was helping us and giving signals. The last signal that I saw Nieman give to Nick Sobieski before Richter got hurt was he told him not to hoist. I didn't see any movement on the part of the ingot after Richter got

hold of it. I saw it fall. I didn't see any movement before it fell."

The evidence with regard to the signals was as follows: Appellee Nieman, Walinski and Drapinski all testified that Nieman signaled Sobieski, who was in charge of the engine, to stop. None of them testified whether there was a subsequent signal to hoist. Walinski testified that, after appellee took hold of the ingot, he was watching the ingot all the time; that he was looking at the ingot and not at Nieman, the signal man. Drapinski testified that he was standing about eight feet from appellee and watching the ingot; that Nieman was standing by him, but as he was watching appellee and the ingot he did not know what Nieman was doing.

Nieman, who was called by the appellee, was not asked whether he gave any signal after the signal to stop. Appellee's attention was necessarily directed to the ingot which he was handling, so that he could not very well observe what Nieman, who stood about eight feet from him, was doing. Sobieski testified that Nieman gave him a signal to stop, which he did; that then appellee came up, caught the ingot and tried to swing it around; that when it turned around Nieman threw up his hands, which is the signal to hoist, when he (Sobieski) put on a little steam and the ingot dropped. There is no contradiction of this evidence, and it shows that if there was any negligence or carelessness in the premises on the part of any of appellant's employes, it was not that of the engineer. He was sixty or seventy feet away from where appellee and the ingot were; Nieman was close to appellee and the ingot, and, therefore, in a much better position to know whether the ingot had swung clear of the other ingot on which the men were attempting to pile it; it was Nieman's duty to give signals and Sobieski's duty to obey them when given, and had he not obeyed them, and by reason of such disobedience an injury had occurred, appellant, waiving any question as to the law of fellow-servants, would have been liable. The evidence on the part of appellee is that Sobieski was not a licensed engineer, and

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that the regular engineer in appellant's employ was one Budniki; it also tends to show that Sobieski's employment was other than operating the engine, and that he had not operated it in the day time or, to the knowledge of any of appellant's witnesses, more than once prior to the time of the accident. This is the only evidence relied on by appellee in support of the allegation that Sobieski was unskillful and incompetent.

Appellant's witnesses testified as follows:

W. C. Clark, assistant superintendent of appellant's mill, in June, 1895, now in the tea and coffee business:

"I am an engineer myself. Sobieski was what I considered a thoroughly competent man in the line of operating the engines connected with the steel hoist near the heating pits at the rail mill. I have seen him running these engines times too numerous to mention. I have observed him while in the operation of these machines. He was not careless or incompetent in any way while I observed him. He was thoroughly competent. I never had any complaint whatever made to me as to his carelessness or incompetency. He had operated these engines off and on for fully a year or two before the accident."

William J. Matthias, night superintendent of the mill, testified that he knew Sobieski for two years prior to June, 1895; that he thought him competent to run the engine, and that he knew of his competency by putting him on that job once or twice a week during the two or three years he knew him.

Frank Simon, foreman of the mill, also testified to putting Sobieski to work on the engine, sometimes twice a day, and Sundays all day, and that he was competent and careful.

It is manifest that the fact that Sobieski was not licensed, is not evidence that he was incompetent or unskillful. Neither can we say, from the record, that, if he were licensed, this would be any evidence of competency or skillfulness, because only a single section of the ordinance is pleaded, and it does not appear from that section that any examination, or evidence of qualification, is required as a condition precedent to obtaining a license. We are of opinion, after a careful consideration of the evidence, that it fails

to prove that Sobieski was incompetent or unskillful, and especially that it fails to prove that the accident occurred by reason of any carelessness, negligence or unskillfulness of the engineer. In this connection we suggest, although the point has not been made, that the gist of the count under which the case was tried, is the employment of an unskillful, incompetent and unlicensed engineer, and there is no direct averment in the count that the accident occurred by reason of the unskillfulness or incompetency of the engineer.

The statute of limitations was pleaded on the theory that the count filed February 24, 1898, states a cause of action essentially different from that stated in the declaration filed October 11, 1895. In this view we can not concur. The former declaration stated, as a cause of action, the placing "the hoisting engine in the care, management and control of an unfit, incompetent and unskillful person, by means whereof," etc. In the latter count the adjective "unlicensed" is added next after the words "unskillful and incompetent." We do not think this a statement of a new cause of action.

The judgment will be reversed and the cause remanded.

Eliza W. Marshall, Executrix, etc., v. Charles B. Eggleston, James P. Mallette, Ralph E. Brownell, Partners, etc., and Fitz A. Woodbury.

1. **TRESPASSERS**—*All Liable, etc.*—All trespassers are treated alike, whether acting for themselves or as agents or attorneys for others.

2. **MESNE PROFITS**—*Sub-lessee of Defendant in Ejectment.*—A party coming into possession as lessee under a defendant in ejectment, during the pendency of the action, is bound by the proceedings in the suit, and liable to an action for *mesne* profits.

3. **NOTICE**—*To Trespassers, Unnecessary.*—A person is not precluded from recovering from trespassers on his property for its use, because he fails to notify them that they are trespassing, and that he will hold them responsible.

Marshall v. Eggleston.

Trespass.—Trial in the Circuit Court of Cook County; the Hon. ELBRIDGE HANECY, Judge, presiding. Finding and judgment for defendants; appeal by plaintiff. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed March 30, 1899.

Statement of the Case.—This suit was trespass by appellant, begun February 7, 1896, against appellees, by which she sought to recover for the use and profits or rental value of certain real estate owned in fee by appellant's testator, the possession of which was wrongfully taken and held for more than one year, as it is claimed by appellant. The pleas were not guilty and *liberum tenementum*, on which issues were joined. A trial before the court, without a jury, resulted in a finding and judgment in favor of appellees, from which the appeal is taken.

In August, 1890, David Dimond, appellant's testator, began ejectment for said real estate against Dubreuill and Lamoreaux, and obtained service of process on each of the defendants during that month. Appellee Woodbury was attorney for the defendants in the ejectment case, and also of the original complainant, and also solicitor of the defendants in the cross-bill in the chancery suit hereinafter mentioned.

March 11, 1891, one Nichols, claiming to have a contract of purchase of said real estate from Dimond, filed his bill, making Dimond a defendant, alleging that Dubreuill and Lamoreaux held possession of said real estate for him, and asking specific performance of the contract. Dimond in April, 1891, answered, denying the contract, and June 22, 1891, filed a cross-bill to set aside the alleged contract as a cloud on his title, alleging the death of Dubreuill since the filing of original bill, administration on his estate, and making Nichols, Lamoreaux and the administrators of Dubreuill, defendants. The defendants all answered November 25, 1891. A decree was entered in the chancery case July 11, 1894, dismissing the original bill for want of equity, and granting the relief asked by the cross-bill. February 21, 1895, all the appellees were made defendants in the ejectment suit, but afterward, on motion of the plaintiff, the

suit was dismissed as to each of them, and on January 17, 1896, after a trial before a jury and the court, judgment was rendered in plaintiff's favor, and a writ of possession awarded to him for the whole of said real estate.

Pending all this litigation, appellee Woodbury, who, as stated, was attorney and solicitor of all the defendants in both the cases, and solicitor for said Nichols, made a lease to the other appellees, December 1, 1892, of said real estate, for one year from that date at \$75 per month, payable at certain intervals during the lease, and providing for its termination after June 1, 1893, on thirty days notice in writing to the lessees. After 1890 to 1894, Dimond was not in possession of said real estate, but re-entered it in the summer of 1894, and placed a wire around part of it. Woodbury testified that he claimed no title to it, had no possession of it himself; that Lamoreaux and Dubreuill were in possession of it during this period, that he was their attorney, but when asked whether he ever received any rent from any one in possession of it, evaded the question.

The evidence shows that the lessees were in possession of said real estate, using it as a stone yard during a part of the period covered by the lease, and that they paid rent to Woodbury under the lease, but what amount does not appear.

LOUIS SHISSLER, attorney for appellant.

F. A. WOODBURY, attorney for appellees.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

Appellees claim the judgment is right. First, because they were dismissed out of the ejectment suit; second, that they had nothing to do in any way with the original trespass, and did no injury to the land; third, appellant's agent saw appellees pay their money, made no protest, and gave no notice they would be held by appellant; fourth, that the damage is only nominal under the evidence; and, fifth, Woodbury can not be held, because he only acted as attorney.

Marshall v. Eggleston.

The first contention is not tenable. Appellant was not bound to continue these appellees as defendants to the ejectment suit, and when they were dismissed out of that case, the statute of ejectment relating to the recovery of *mesne* profits has no application to them. They were liable to an action in trespass for *mesne* profits. *Waterman on Trespass*, Secs. 928 and 931; *Snow v. McCormick*, 43 Ill. App. 538, and cases there cited; *Western B. & S. Co. v. Jevne*, 78 Ill. App. 669; *Green v. Biddle*, 8 Wheaton, 75.

In so far as *Smith v. Wunderleck*, 70 Ill. 426, may be said to hold to the contrary, we think the language was not applicable to that case, as there had been no re-entry by plaintiff, as in the case at bar.

As to appellees' second point, it is wholly immaterial that they had nothing to do with the original trespass, and did not injure the land. Appellant does not seek to recover for injury to the land, but for its use by appellees wrongfully. Appellee Woodbury, being the attorney of the defendants in the ejectment suit then pending, had actual notice of appellant's rights and title. In fact, he says in his brief he leased the premises for the defendants in the ejectment case. The other appellees, taking and holding by virtue of the lease to them by Woodbury, can get no greater right or title than he. Moreover, they are bound by constructive notice of appellant's rights and title by the pendency of the ejectment and chancery suits. They can not be innocent purchasers any more than a tenant who takes a lease from a stranger pending foreclosure proceedings. Appellees were all trespassers, and equally liable with the original trespassers for the time they used the property. *Yates v. Smith*, 11 Ill. App. 459; *Ellis v. Sisson*, 96 Ill. 105; *Schreiber v. R. R. Co.*, 115 Ill. 340; *Doe v. Whitcomb*, 8 Bing. 46; *Bradley v. McDaniel*, 3 Jones (N. C. Law), 128.

3d. There is no evidence that appellant saw appellees pay their money. Appellant's agent was told by one of the appellees he had paid rent. We have been cited no authority that appellant is precluded from recovering from trespassers on his property for its use, because he fails to notify

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them that they are trespassing, and fails to tell them he would hold them. We think there is no such respectable authority.

4th. It does not tend to support the judgment in this case that the evidence, as claimed by appellees, shows only nominal damages. That fact, if shown, as we think it is not, could not affect appellant's legal right to a judgment even for nominal damages.

5th. Even if appellee Woodbury was attorney, and only acted as such, he can not escape liability. All trespassers are treated alike, whether acting for themselves or others. Also, when he had an opportunity, in answer to a direct question, to show he had paid the rent to his clients, he fails to answer whether he did or not.

The judgment is reversed and the cause remanded.

Berlin Machine Works v. Keenan Brothers Mfg. Co.

1. **DAMAGES**—*Excessive, Under the Evidence.*—Under the evidence in this case the court holds that the recovery of damages was limited to one hundred dollars.

Assumpsit.—Breach of contract. Trial in the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Remittitur, ordered filed April 20, 1899, and cause affirmed. Opinion filed March 30, 1899.

On the 29th day of October, 1896, appellee gave to a salesman of appellant an order for a sanding machine on one of the regular printed blanks furnished by appellant, which was substantially as follows:

"CHICAGO, Oct. 29, 1896.

BERLIN MACHINE WORKS,

Main office and works,
Beloit, Wisconsin.

Branches:
New York, Chicago,
San Francisco.

Please ship in good order, delivered F. O. B. our factory,

Berlin Machine Works v. Keenan Bros. Mfg. Co.

about, at once, 1-48 invincible sander, number 8, perfectly constructed.

You agree to have an expert to superintend setting and starting machine which you agree to set in place—we to furnish all belts.

For which we agree to pay within four months after date of shipment, six hundred and fifty dollars, as follows:

One-half in 60 days after date of shipment.

One-half in 120 days after date of shipment.

It is agreed that title to the property mentioned above shall remain in consignor until fully paid for and that consignee shall keep the same fully insured for the benefit of consignor. It is agreed that this contract is not modified nor added to by any agreement not expressly stated herein, and that retention of the property after thirty days from date of shipment shall constitute acceptance and trial and void all contracts of warranty, express or implied.

Ship via.....

(Signed) KEENAN BROS. MFG. CO.
By John Keenan, Pres.

Accepted by
EDWIN ANDERSON,
Salesman for Berlin Machine Works,
Subject to approval main office,
Beloit, Wisconsin."

This order was never formally accepted by the appellant corporation; but a series of negotiations ensued, which resulted in a counter proposition made by appellant to appellee, which differed from the original proposition to buy only in the matter of time of delivery. This counter proposal is made by the following letter sent by Anderson, salesman of appellant, to appellee:

"We advised our factory just what your Mr. Keenan told us over the telephone, that you would cancel the order if the machine was not here in a week from the time you gave the order, at which time we thought it would be possible to deliver you a machine.

We have received a letter from our president, Mr. P. B. Yates, dated Beloit, as follows:

'In relation to Keenan Bros., would say that we care very little for the business, and if we lose it, it will be no great loss. We have been rushed almost to death, and we can not ship their machine inside of ten days or two weeks, unless we would rush it through and give them a poor machine.

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It would be well enough to so advise them, and if they wish to cancel the order and buy elsewhere, it is just as well if they do it, for I understand we are not only to pay the freight on the machine to Chicago, but to deliver it to their mill, and are obliged to raise it to the second or third story, and the expense will be no less than \$50, which will net us a price at which no other concern in America can net any profit at all. We want their business just for the sake of shutting out competition, but with the most superhuman efforts, we could not get this machine out any sooner. It will be at the utmost a week from next Thursday before we can deliver them the machine.'

You will note by the above, that, owing to the press of business, they can not get you a machine at the present time in less than ten days or two weeks. It might be sooner, but they do not want to guarantee any quicker delivery.

They are making you a machine carefully, but have a great deal of work, and do not want to promise before they can really ship.

This ends our side of the question, and if it is not agreeable to you, and you wish to cancel the order, which we hope you will not, we will have to abide by the consequences.

As soon as the machine is delivered in Chicago, we think it will be, within twelve hours, in running condition.

Drop us a postal as to your decision in the matter, and oblige."

There was evidence tending to show that this counter proposal of appellant was accepted by appellee.

Afterward appellant refused to carry out the contract, basing its refusal upon insulting language claimed to have been used by one of appellee's agents in conversation with an agent of appellant, and also upon the fact that the original order had never been accepted by appellant. For breach of the contract appellee brought this suit.

The jury found the issues for appellee, and assessed the damages at \$450.

From judgment upon the verdict this appeal is prosecuted.

FARSON & GREENFIELD and CRATTY, JARVIS & CLEVELAND,
attorneys for appellant.

STERLE & ROBERTS, attorneys for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

The original written order was not formally accepted by appellant. But there was sufficient evidence to warrant the jury in finding that a counter proposition made by appellant, by which the machine in question was to be delivered by November 19, 1896, was accepted by appellee. The evidence as to a breach of the contract is uncontradicted. The only questions, therefore, which we have to consider are such as relate to the measure of damages and matters of procedure.

The testimony showed that appellee was, by reason of the breach of the contract, deprived of the use of a sander, the machine in question, for two weeks. It is also claimed as an element of damage, that appellee was obliged to purchase a machine in the market at a price higher than the price agreed upon in the contract with appellant.

No competent evidence was presented by appellee to show the rental value of such a machine for the period of two weeks. But appellant did present evidence in this behalf, and while it is perhaps questionable if it disclosed the true rental value, disconnected with the element of a conditional sale, yet appellant can not complain if the evidence presented by itself be taken as the basis of value. The damages for deprivation of use, measured by this, the only evidence in the case upon this point, could not exceed \$25 for the two weeks. Nor was there any competent evidence offered by appellee as to the market price of machines like the one in question at the time of the purchase. It merely sought to show what it had paid; not what it was compelled to pay. Upon this question of value, appellant presented evidence. From such evidence it would appear that the highest valuation would fix the measure of damages in this behalf at \$75. There is no evidence in the case which warranted the jury in assessing appellee's damages at more than the aggregate of these two sums, viz., \$100. No special contract of appellee with others, or probable damage

which might result therefrom upon a failure on the part of appellant to carry out its contract, can be said to have been considered by the parties in the making of this contract.

If there was error in refusing to give the instruction asked by appellant as to the right of appellee to recover upon any agreement other than an acceptance of the written order, because of the pleadings, such error was waived by the tender of another instruction by appellant, which the court gave, and by which the right to recover upon such later agreement was recognized, if the jury found such an agreement to exist.

If the appellee shall, within ten days, remit \$350 of the amount of the judgment, then the judgment will be affirmed as to the remainder, viz., \$100; otherwise it will be reversed and the cause remanded. In either event, appellant will recover costs.

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182 440

Charles W. Hinkley v. Alanson H. Reed et al.

1. **EQUITY JURISDICTION—A Fundamental Rule.**—It is a fundamental rule in equity jurisdiction that a court of equity will look to the substance rather than the form of a transaction.

2. **SAME—Power to Ignore Corporate Existence.**—A court of equity will sometimes ignore corporate existence, in order to do justice.

3. **FRAUDULENT TRANSFERS—By Insolvent Firms.**—Where an insolvent partnership makes a transfer of all of its assets and good will to a corporation created by the partners for that purpose, takes its pay in stock of such corporation, assumes control as officers of such corporation, and enters into the management of its business, creditors of the firm may levy an attachment or execution on the property, or reach the stock, or file a bill in equity to set the transfer aside.

4. **VOLUNTARY ASSIGNMENTS—Where the Assignor has no Title.**—An assignor who derives title to the goods he assigned through a fraudulent and void conveyance, can convey to his assignee no greater or better title than he has himself.

Creditor's Bill.—Trial in the Circuit Court of Cook County: the Hon. RICHARD S. TUTHILL, Judge, presiding. Bill dismissed for want of equity; appeal by complainants. Heard in this court at the October term, 1898. Reversed and remanded with directions. Opinion filed March 10, 1899.

Hinkley v. Reed.

This is a creditor's bill by appellant against Alanson H. Reed, J. Warner Reed, A. Reed and Sons, a corporation, J. W. Reed, Jr., George H. Signor, and the Chicago Title & Trust Company. The court dismissed the bill for want of equity. The defendants to the bill answered and replications were filed.

The parties stipulated as follows:

"The following are agreed upon as the existing facts to govern upon the hearing of the above entitled cause:

That on the 4th day of May, A. D. 1898, complainant commenced a suit in assumpsit in the Circuit Court of Cook County against the defendants, Alanson H. Reed and John Warner Reed, copartners as A. Reed & Sons (hereafter called principal defendants), and on the 31st day of May, 1898, recovered judgment against said principal defendants for the sum of \$595.19 and costs of suit, in the said Circuit Court of Cook County.

That on or about the tenth day of June, 1898, a writ of fieri facias was issued upon said judgment, and on the 30th day of June, 1898, delivered to the sheriff of Cook county, and on the 8th day of July, 1898, after demand having been made on said principal defendants, said writ was returned *nulla bona*, as set forth in the bill of complaint herein. That a writ of fieri facias was also issued and delivered on or about July 1, 1898, to the sheriff of Lee county, Illinois, and that on the 8th day of July, 1898, said last mentioned writ was returned *nulla bona*, as set forth in said bill.

That the said judgment remains in full force and effect, and is unpaid and unsatisfied, and that there is due thereon the sum of \$595.19, together with costs, and interest from the 31st day of May, 1898.

That said judgment was entered upon a promissory note executed by said principal defendants on December 30, A. D. 1897, and payable four months thereafter, and acquired by complainant in good faith before maturity for a good and valuable consideration, and that the said judgment was obtained after due service of process upon said principal defendants.

That said principal defendants had been engaged in business for a number of years in Chicago, and were possessed of personal property in Chicago, and had a manufacturing establishment, consisting of machinery, tools, material, pianos in process of manufacture and manufactured, at Dixon, Lee county, Illinois, and an interest in the building

containing the same, and the ground upon which said building was located.

That the firm composed of said principal defendants had incurred large liabilities, and said firm and the principal defendants were insolvent on the 27th day of May, 1898, and their liabilities exceeded their assets.

That on the 27th day of May, 1898, said principal defendants caused to be recorded a charter issued on March 20, 1897, by the Secretary of State of Illinois to a corporation known as A. Reed & Sons, defendant herein, in pursuance of a license issued March 21, 1895; that the meetings for the organization of said corporation and for the election of directors thereof, were held at the office of said principal defendants; that the defendant Alanson H. Reed subscribed for five hundred shares; defendant John Warner Reed, for four hundred and ninety-seven shares, and J. W. Reed, Jr., George H. Signor and A. L. Reed, for one share each; and that said principal defendants and George H. Signor were elected directors of said corporation on the 27th day of May, 1898, and on the same day said principal defendant Alanson H. Reed was elected secretary and treasurer of said corporation, and said principal defendant J. Warner Reed was then elected president thereof, and said defendant George H. Signor was then elected vice-president thereof; that said corporation did not complete its organization by recording its charter, nor proceed to business, until the 27th day of May, 1898, and prior to that date had acquired no assets and done no business. That on said 27th day of May, 1898, the principal defendants, in consideration of the issue to them of five hundred shares of full paid capital stock of said corporation, transferred to it all of the assets and good will of their firm, and that no other consideration for such transfer passed, and that none of the indebtedness of said firm was at that time assumed by said corporation, and that said corporation thereupon took possession, charge and control of said assets and of the business, and issued two hundred and fifty shares of stock of said corporation to each of said principal defendants; that one share was issued to said Signor for services rendered by him in the organization of said corporation and for taking care of the books thereof, and that no other stock has been issued.

That said principal defendants, as officers of said corporation, entered into the management and control of its business and continued the same until the appointment of a receiver by this court, in the case of the New York Life

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Insurance & Trust Company against the said principal defendants and others, as hereinafter set forth; that the same office was retained and the principal defendants, as officers of said corporation, remained in control of the business, but that they made the offer to a number of their creditors to resign in favor of officers to be chosen by a majority of their creditors, and made the same offer in open court, upon the application for a receiver in said New York Life Insurance & Trust Company's case; but that new books of account were opened for such corporation.

That a deed for voluntary assignment for the benefit of creditors was executed by said principal defendants on the 28th day of May, 1893, delivered to George H. Signor, as assignee, and duly filed for record in the recorder's office and County Court of Cook County aforesaid, and that said Signor duly qualified, as assignee, and gave bond as provided by the statute.

That the circular letter set forth on pages 12 and 13 of the bill of complaint herein was mailed by said principal defendants to all their creditors so far as known.

That a creditor's bill was filed on June 21, 1898, by the New York Life Insurance & Trust Company against said principal defendants, herein named, and others, and a receiver was appointed thereunder, of the assets of said principal defendants, and that said receivership was, afterward, on June 24, 1898, extended to said corporation, and that such receivership continued until the 8th day of July 1898, when said suit was dismissed, and the receiver appointed therein discharged.

That on said 8th day of July, after the dismissal of said cause, a meeting of the directors of said corporation was held, at which the following resolutions were adopted:

Resolved, that whereas, on the 27th day of May, A. D. 1898, the firm of A. Reed & Sons assigned, transferred and conveyed to this company all of the assets, good will and business of said firm, which transfer, while intended in good faith, has been held by the Circuit Court of Cook County to have been in law fraudulent, because none of the debts of said firm were assumed by this company.

Be it therefore resolved, that this company assumes all of the indebtedness of the firm of A. Reed & Sons existing at the time of such transfer, and agrees to pay the same, and inasmuch as this company is now believed to be insolvent, and it is desirable that all of its creditors shall share alike, be it further

Resolved, that this company do make a general assignment to the Chicago Title & Trust Company, as assignee, of all its assets for the benefit of its creditors. That the assignment deed be made in duplicate, one copy to be recorded in Cook county, and one in Lee county, Illinois, and that the president and secretary of this company are hereby instructed to execute such deed of assignment, and at the same time made a general assignment for the benefit of its creditors to the Chicago Title & Trust Company, as assignee without preferences; that said deed was made in duplicate, and was recorded in both Cook and Lee counties, Illinois, on the 9th day of July, 1898.

That said corporation had possession and control of the assets of said firm for a brief period, to wit, from the 27th day of May, 1898, to the 24th day of June, and on the 8th day of July, 1898, and did little business, and contracted very little indebtedness, aside from the liabilities assumed by it, as aforesaid, of the indebtedness of the principal defendants, and aside from the aforesaid assumed liabilities, was solvent at the time of making said assignment.

That the factory and grounds at Dixon, Illinois, where the said principal defendants were manufacturing their pianos, were held by virtue of a lease and agreement, dated March 14, 1894, which provided that said principal defendants might occupy the same for five years, free of rent, and, if during the said period, they should continuously, in good faith, there manufacture their pianos, and not elsewhere, they should receive, at the expiration of said period, a warranty deed of the factory and grounds; that a failure to manufacture pianos there, for the space of three months continuously (except on account of labor strikes, etc.), should forfeit their rights under said lease and agreement. That their rights under said agreement should be in no wise transferable, except to a corporation to be organized to continue the business of manufacturing their pianos.

Dated this 8th day of September, 1898.

M. B. & F. S. LOOMIS,
Sol'rs for complainant.
SAMUEL M. BOOTH,
Sol'r for defendants."

The circular referred to in the foregoing stipulation is as follows:

"CHICAGO, June 7, 1898.

GENTLEMEN: We have been compelled by force of circumstances to make an assignment Saturday, May 28th,

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for the benefit of our creditors. Previous to doing so we transferred to A. Reed & Sons, a corporation organized under the laws of the State of Illinois, all our assets, including the lease of the factory building at Dixon, Ill., bills, stock and materials on hand, and bills and accounts receivable.

We receive in exchange therefor 500 shares of the stock of A. Reed & Sons corporation, of the par value of \$100 each, \$50,000, and this we handed over to our assignee, Mr. Geo. H. Signor, our former bookkeeper.

We were led to do this by the actions of certain of our creditors, who, in their efforts to gain advantage over others, seemed willing that any sacrifice of our assets should be made if they should thereby gain preference for themselves.

It has been our intent that all should share alike, as far as it has been in our power to accomplish that result. Our factory at Dixon, Illinois, is held under a contract dated March 14, 1894, whereby it becomes our absolute property at the end of five years, provided the business was carried on continuously during that time.

It is also stipulated in the contract that our right is in no way transferable, except to a stock company of the same name which might be organized to succeed our firm and continue the business. We had been negotiating with different parties to secure additional capital, and had secured the necessary charter from the State for a stock company. In view of our recent financial difficulties, and in order to continue the business, prevent the sacrifice of our assets, and secure the factory and plant for the benefit of all, we thought it best to transfer to the new company all our assets as stated above.

At the earliest practical moment we shall call a meeting of our creditors, of which due notice will be given, to explain the condition of our affairs and confer with them as to the best course to be taken. We believe, with a proper extension and the support of our creditors, that, in time, all our indebtedness can be paid off. Regretting the present unfortunate state of affairs, we remain,

Yours truly,

A. REED & SONS."

The bill prayed, among other things, that the transfer by the firm of A. Reed & Sons of their property to the corporation, A. Reed & Sons, and the voluntary assignment

by said firm to Signor, should be declared fraudulent and void and set aside, and that the Chicago Title & Trust Company be decreed to hold the property assigned to it in trust for the benefit of Alanson H. and J. Warner Reed, etc.

M. B. & F. S. LOOMIS, attorneys for appellant, contended that the authorities clearly establish two distinct grounds upon which conveyances and other contracts will be deemed fraudulent as against creditors: First, such as are entered into with a fraudulent intent; and, second, such as, from the terms of the agreement, or the nature of the transaction itself, are deemed so as a mere inference of law, without regard to the motives or actual intentions of the contracting parties. In the first class of cases the fraudulent intent is always a question of fact, to be established by extrinsic proofs. In the latter, the agreement, under the circumstances shown, is deemed fraudulent, although the parties may have acted in the best of faith.

Apt illustrations of the latter class of cases are found in the case of an insolvent person who transfers his property to another, reserving to himself a beneficial interest therein; or where one, being insolvent, disposes of the whole of his estate upon a long credit, thereby putting it beyond the reach of his creditors; or where one, by a contract not in writing, makes a sale of chattels and retains possession thereof. All such contracts and transactions are conclusively presumed, as an inference of law, to be fraudulent, without regard to the real motives or purposes of the parties. *Lanson v. Funk*, 108 Ill. 502; *Thornton v. Davenport*, 1 Scam. 296; *Phelps v. Curts*, 80 Ill. 109; *Greenebaum v. Wheeler*, 90 Id. 296; *Kepner v. Burkhart*, 5 Barr. 478; *Grannis v. Smith*, 3 Humph. 179; *Mitchell v. Beal*, 8 Yerg. 134.

In equity a junior judgment creditor may obtain a prior lien by exhausting his remedy at law, and first invoking the aid of a court of equity by filing his creditor's bill. So that the only importance to be attached to the question as to when the executions were in the hands of the sheriff, is that they were there before the filing of the bill.

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See, on this subject, Hallorn v. Trum, 125 Ill. 247; Durand & Co. v. Gray, Kingman & Collins, 129 Ill. 9; Lyon v. Robbins, 46 Ill. 276; Rappelye v. International Bk., 93 Ill. 396; cases *pro* and *con* in 17 L. R. A. 345, *et seq.*; Bump on Fraudulent Conveyances, 534; Moore v. Horsley, 156 Ill. 36; Springfield Homestead Ass'n v. Roll, 137 Ill. 205; Tyler v. Tyler, 126 Ill. 525.

SAMUEL M. BOOTH, attorney for appellees.

MR. JUSTICE ADAMS delivered the opinion of the court.

It appears from the stipulation of facts that Alanson H. Reed and John Warner Reed, composing the partnership firm of A. Reed & Sons when, May 27, 1898, they caused to be recorded the certificate of organization of the corporation A. Reed & Sons, and attempted to transfer their property to that corporation in exchange for stock, were insolvent, and that their liabilities exceeded their assets. It also appears from the circular which, by reference, is made a part of the stipulation of facts, that one object of the partnership firm of A. Reed & Sons in so transferring their assets and property to the corporation, was to hinder and delay certain of their creditors who, in the exercise of their legal rights, were making efforts to collect their claims against the firm. In the circular, after mentioning the transfer of their assets to the corporation, they say: "We were led to do this by the actions of certain of our creditors who, in their efforts to gain advantage over others, seemed willing that any sacrifice of our assets should be made, if they should thereby gain preference for themselves." It further appears from the stipulation of facts, that after the transfer to the corporation, there was no change in the possession of the assets of the copartnership, or in the control or management of the business. The Reeds, one the president, and the other the secretary and treasurer of the infant corporation, retained possession of the assets and managed and controlled the business precisely as before. There were three directors, the Reeds being two of them, and Signor, their bookkeeper, the third.

It is fundamental in equity jurisprudence that a court of equity will look to the substance rather than the form of a transaction. 1 Beach on Mod. Eq. Jurisp., Sec. 7; 1 Pomerooy's Eq. Jurisp., Sec. 363.

In Anthony et al. v. Am. Glucose Co., 146 N. Y. 407, the court uses this language:

"There are two theories of the facts of this case; one technically true but substantially an error; the other really true but formally open to criticism; and upon our choice between them will be quite certain to depend the ultimate conclusion. One theory interposes between the parties interested and actually contracting, the corporate entities of the five original companies, and behind that legal shelter seeks to protect the company in default to its stockholders and turn them over for relief to their own original company after, by agreement, all its functions had ceased, although possibly it may not be altogether and hopelessly dead. The defense is not meritorious. It simply attempts to substitute circuitry of action for direct responsibility, and requires us to blind our eyes with the theoretical abstraction so as to shut out the obvious and undoubted truth. We have of late refused to be always and utterly trammelled by the logic derived from corporate existence, when it only serves to distort or hide the truth, and I think we should not hesitate in this case to reject the purely technical defense attempted."

In Sondheimer et al. v. Graeser, 172 Ill. 293, the court did not hesitate to hold that Sondheimer & Co., who largely controlled a corporation which succeeded to the rights of a mortgagor, sustained the same relation to the mortgagee as did the mortgagor, and that they, Sondheimer & Co., were practically the corporation. In that case, Sondheimer & Co.'s control of the corporation was not nearly so great as was the control of the Reeds of the corporation A. Reed & Sons. The Reeds were the corporation and the corporation was the Reeds. The corporation was a mere dummy, and the substance of the transaction was that the Reeds, in formally transferring the assets to the corporation, really retained them in their own possession and control. There was a mere paper transfer, nothing more. "The court will sometimes ignore the corporate existence in order to do justice." 1 Cook on Corp., 4th Ed., Sec. 6.

The same author writes thus: "The rules laid down in the preceding sections are applicable in most respects to a sale by a partnership of all its property to a corporation in exchange for stock. Such sales often are made in order to merge a solvent copartnership into a corporation. They are also made sometimes by an embarrassed or insolvent firm. In such a case, the creditors of the firm may object. They may levy an attachment or execution on the property, or reach the stock, or file a bill in equity to set the sale aside," etc., citing cases. 2 Id., Sec. 675.

In *Booth v. Bunce*, 33 N. Y. 139, the creditor of an insolvent firm, which had formed a corporation and transferred its property to it, levied an execution on the property as the property of the copartnership firm. The court held that the transfer was void, and that the title remained in the copartnership and the property was subject to the execution.

To the same effect are *Buell et al. v. Rope et al.*, 39 N. Y. Supplement, 475, and *Skinner v. Terhune*, 45 N. J. Eq. 565. The pretended transfer by the Reeds to the dummy corporation being void, the title to the partnership property did not pass to the corporation, but remained in the Reeds.

The next question is as to the effect of the assignment of May 28, 1898, by the Reeds to George H. Signor. The circular states, "That a deed of voluntary assignment for the benefit of creditors was executed by said principal defendants on the 28th day of May, 1898, delivered to George H. Signor, as assignee, and duly filed for record in the recorder's office and County Court of Cook County aforesaid, and that said Signor duly qualified as assignee, and gave bond as required by the statute."

Alanson H. and John W. Reed, in their answer to the bill, admit that on the 28th day of May, 1898, they executed and delivered to Signor a deed of assignment of all of their property for the benefit of their creditors, etc. The assignment by the Reeds to Signor of all their property, vested in Signor, as such assignee, title to all the property of the Reeds, for the benefit of their creditors, and the assigned

estate is to be administered and settled by the assignee subject to the directions of the County Court, and as prescribed in the act concerning voluntary assignments. Inasmuch as no title passed to the corporation, A. Reed & Sons, by the pretended transfer to it of date May 27, 1898, the assignment by that corporation to the Chicago Title & Trust Company, of date July 8, 1898, was ineffective to convey to the Chicago Title & Trust Company any title to the property and assets of the Reeds. The title to the property of the Reeds having passed to George H. Signor, by the assignment to him, and the County Court having acquired jurisdiction over the same prior to May 31, 1898, the date of appellant's judgment, appellant acquired no lien on the property, and is not entitled to be preferred to other creditors in the administration of the insolvent estate. Appellant, however, is entitled to have the pretended transfer to the corporation, A. Reed & Sons, set aside and declared void. *Clinton Hill Lumber Co. v. Strilby*, 52 N. J. Eq. 576; *Metcalf v. Arnold*, 110 Ala. 180; *Buell v. Rope*, *supra*.

This being true, the bill should not have been dismissed. The decree will be reversed and the cause remanded, with directions to enter a decree declaring fraudulent and void the pretended transfer by Alanson H. Reed and John Warner Reed to the corporation, A. Reed & Sons, and that the assignment of May 28, 1898, by the Reeds to George H. Signor, for the benefit of the creditors of the Reeds, was valid and effectual, as a voluntary assignment, to invest said Signor with title to all of the assets and property of the Reeds, and that the said pretended assignment by the corporation A. Reed & Sons to the Chicago Title & Trust Company of date, to wit, July 8, 1898, was of no force or effect, and was ineffective to convey title to any property or assets theretofore owned by the Reeds or in which they theretofore had any interest.

Reversed and remanded with directions.

Henry G. Dillaway v. Northwestern National Bank.

1. **BANKS AND BANKING**—*Power to Correct Mistakes in Certification of Checks.*—In case a bank has, through mistake, certified a check for an amount greater than the drawer has on deposit, it may, upon discovering the mistake, and after the check has been delivered by the bank with certification to the holder, upon again getting temporary possession of it, cancel and make the certification of no effect as between the holder and the bank, provided no rights of other parties have intervened, and the situation or rights of the holder, between the certification of the check and its cancellation, has in no way changed.

Assumpsit, on a certified check. Trial in the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Finding and judgment for defendant; appeal by plaintiff. Heard in this court at the October term 1898. Affirmed. Opinion filed March 30, 1899.

Statement of the Case.—Appellant was plaintiff in the court below in a suit to recover on appellee's alleged certification of a check drawn by one of its depositors and indorsed by the payee to appellant.

The check was for \$500, dated August 27, 1895, drawn by E. C. Gibson on his account at the Northwestern National Bank, payable to the order of C. R. Goode. The payee indorsed it for value to appellant, and the latter sent it through his bank—the Shawmut National of Boston—for collection, and in September, 1895, it was returned to him unpaid. On being told by the drawer that it was good and would be paid, he sent it again, in February, 1896, to W. O. Lindley, an attorney in Chicago, with instructions to present and collect it. Mr. Lindley went with the check to the appellee bank and presented it to the paying teller. The latter took it, looked at the bank's books, saw that the drawer had just deposited \$1,000, told Lindley of this fact and that the check was good, and thereupon certified it in the usual way. Lindley took it to his bank for deposit, but some question being there made upon the fact that the indorsement to the Shawmut National Bank had not been erased, went back to the Northwestern, presented the check

to the teller, and asked for the cash, or a cashier's check for the amount. The teller took the check and handed it to Mr. Dummer, the vice-president. The latter told Mr. Lindley that the teller ought not to have certified the check and that he intended to cancel the certification. Mr. Lindley protested, and demanded the money or the return of the check in the condition in which he had delivered it. Mr. Dummer replied that the bank was perfectly responsible, and the cancellation made no difference in the legal rights of the parties, but that he did not want to let the check get into the hands of a third party. He thereupon drew a pen through the certification, and returned it to Mr. Lindley.

The books of the bank at the opening of business on the morning the check was presented showed an overdraft in the drawer's account of \$675.21. The deposit of \$1,000 was made before the check was presented.

If the deposit of \$1,000 applied to the payment of the overdraft, there was a balance of \$324.79 to the drawer's credit when the check was presented. This amount the bank did not retain, nor pay to appellant, but afterward paid it out on other checks.

The declaration contained the common counts and a special count on the check. The defendant filed the general issue verified. The evidence of the state of the drawer's account was objected to as not admissible under the pleadings, but was admitted over the objection.

The court rejected appellant's proposition of law, found the issues for the defendant, and entered judgment, from which this appeal is prosecuted.

TENNY, McCONNELL, COFFEEN & HARDING, attorneys for appellant.

CHARLES M. STURGES, attorney for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

The principal question presented is whether, in case a bank has, through mistake, certified a check for an amount

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greater than the drawer then has on deposit, it may, upon discovering the mistake, and after the check has been delivered by the bank with certification to the holder, and upon again getting temporary possession of it, then cancel the certification and thereby make the certification of no effect as between the holder and the bank, no rights of other parties having intervened, and the holder having in no way changed his situation or rights between the certifying and the cancellation.

It would seem that by the authority of text writers and the decisions of other States, such a mistake may be rectified by canceling the certification, if done before any rights have intervened or been changed by the certification. 1 Morse on Banking (3d Ed.), Sec. 419; 2 Daniel on Neg. Inst. (2d Ed.), Sec. 1608; Tiedeman on Commercial Paper, 221; Second Nat. Bank v. Western Nat. Bank, 51 Md. 128; Troy City Bank v. Grant, 1 Hill & Denio, 119; Irving Bank v. Wetherald, 36 N. Y. 335; Natl. Park Bank v. Steele, 58 Hun, 81.

We are aware that there are English decisions holding, in effect, that an acceptance is irrevocable when made and delivered to the holder of the bill. Thornton v. Dick, 4 Esp. 270; Bentricks v. Dorrien, 6 East, 199.

And it is also true that the decisions relied upon by the authors of the text above cited are decisions in cases of the certifying of promissory notes, and not checks on banks. But the text writers have taken the doctrine announced in these cases as applying in principle as well to bills of exchange generally, and in the text of Morse and Daniels the rule is applied to checks upon banks. We see no logical reason why, if in the one case such mistake of fact may be corrected, when no rights have intervened or been changed so as to make the correction inequitable, it should not as well apply in the other. The principle is the same. Morse announces the rule thus:

“If the bank certifies the check by mistake, under the erroneous impression that it has sufficient funds of the drawer to apply upon it, and if the discovery is made with

reasonable promptitude and immediately notified to the holder, if the check itself still remains in the hands of the party who presented it for certification, and if his position is precisely the same after the revocation that it would have been had the bank originally refused acceptance, if he has not lost his opportunity to charge indorsers, if he has parted with no collateral security, has released no sureties, has not had his power of collection from the drawer of the check diminished by any intermediate occurrence—then it seems that it is not too late for the bank still to undo its mistake; * * * if the circumstances are such that all innocent parties are in the same position as if the bank had refused to certify at first, then it may be revoked.”

Daniel says:

“If the bank certifies a check to be good by mistake, under the erroneous impression that the drawer had funds on deposit, when in fact he had none, or has been induced by some fraudulent representations to certify it as good, the certification may be revoked and annulled, provided no change of circumstances has occurred which would render it inequitable for such right to be exercised. If the check still remains in the hands of the holder who held it when it was certified, and the mistake is discovered and notified to him so speedily that he has time afforded him to notify and preserve the liability of indorsers, the bank may retract its certification.”

But it is contended that a different rule obtains in this State, and in support thereof counsel for appellant cite the decision in *Met. Nat. Bank v. Jones*, 137 Ill. 634.

The effect of this and other decisions of our Supreme Court, so far as they bear upon the case here, is to hold that the acceptance or certifying of a check by a bank operates to fix the liability of the bank, irrespective of the condition of the account between bank and drawer; and that it also operates to discharge the drawer from liability to the payee upon the check so certified. But these decisions speak only of the effect of a valid and effective certification. The question presented here is as to whether the certification in question is valid and effective; not as to what its effect would be if it were valid and effective. If it was not an effective certification, but on the contrary was made by mistake and remained

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possibly effective only in relation to any rights which might be affected by it, if any such there had been, until the mistake was corrected and thereupon became absolutely inoperative, then we have nothing to do with questions which relate only to the effect of a valid certification.

The rule announced by the New York courts is the same as here as to the effect of the acceptance or certifying of a check by a bank, as indicated by *First Nat. Bank v. Leach*, 52 N. Y. 350, cited in *Met. Nat. Bank v. Jones*, *supra*. But the New York courts also hold that a mistake of fact by a bank in certifying a note may be corrected, if such correction does not interfere with rights which have been changed by the certification, as indicated in *Irving Bank v. Wetherald* and *Troy Bank v. Grant*, and *Nat. Park Bank v. Steele*, cited *supra*.

We, therefore, are of opinion that the Illinois decisions do not apply to the facts of this case; and we hold the law to be here as announced by text writers and decisions above cited.

When the \$1,000 was deposited, it operated to extinguish the debt owed by the depositor to the bank by reason of the overdraft, and to leave a balance of \$324.79 only to the credit of the drawer when the check was presented. The fact that the bank ledger did not show this application at the time the check was presented to be certified, is unimportant. "In other words, when a check is presented to a bank for payment, the bank will take into consideration all the funds which it has received from the drawer subject to check to that time, and the total amount of all sums up to that time which it has paid out on his account. A balance thus ascertained will determine the obligation of the bank to pay or its right to refuse payment, regardless of the fact whether the amounts deposited or the checks paid may have reached the bank ledger or not." *Am. Exchange Bank v. Gregg*, 138 Ill. 596.

The evidence and admissions of counsel warranted the court in finding that the certification of the check was given through a mistake as to the condition of the drawer's

account. The check had been previously presented and dishonored. When it was again presented the teller learned of the \$1,000 deposit and supposed that it was to the credit of the depositor and applicable to this check. He was not aware that it was largely reduced in amount by application to the overdraft. He did not, knowing of the depositor's true balance, undertake to give further credit to the depositor by this acceptance. There is no claim that anything was done by appellant whereby his position was changed by reason of the giving of the certification, and before its cancellation some thirty minutes later. But it is contended that this acceptance should be held to have been valid as to the amount of \$324.79, the true balance of the depositor. It is well settled, that the balance of the depositor in bank being less than the amount of the check, the check does not operate to entitle the payee, as against the bank, to such smaller amount. *Coates v. Preston*, 105 Ill. 470.

We are of opinion that the defense was properly admitted under the pleadings.

We are also of opinion that the court did not err in rulings upon propositions submitted as propositions of law. The judgment is affirmed.

Leroy Marsh et al. v. James M. French.

1. VERDICTS—*When Not Against the Weight of the Evidence.*—When upon the question at issue, the evidence is so directly conflicting that a court of review can hardly determine that a verdict for either litigant is manifestly against the weight of the evidence, the Appellate Court can not say that it is not sufficiently sustained by the evidence, and has merely to pass upon questions relating to procedure.

2. AGENTS—*Declaration of—When Admissible.*—Where there is direct and positive testimony as to the fact of an agency, it is proper to admit evidence of the transaction of the alleged agent in relation to the subject-matter at issue, and if in the course of such transactions, conversations occurred in which statements were made by the agent affirming his agency, such statements are admissible, but the court

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should, at the request of the adverse party, limit the effect of such evidence by instructing the jury that the statements are not to be considered as evidence of the fact of the agency.

3. *SAME—Power to Bind his Principal by Indorsement.*—If an agency is established and an express authority shown to draw upon the principal for amounts needed to carry on the business, it carries along with it an authority to procure an indorser of the drafts drawn by the agent for the purpose of the agency.

4. *SAME—Former Transactions Competent to Show Authority.*—It is competent to show former transactions between a principal and his agent in the scope of the employment as tending to show the agent's authority.

5. *DEPOSITIONS—Practice, When Returned Too Late, etc.*—Where a party is likely to be prejudiced from the late return of a deposition, the proper practice is to interpose a motion for continuance over the term, or for delay until preparation for trial can be made.

6. *BOOKS OF ACCOUNT—Not Admissible Because Produced on Notice.*—The fact that books of account are produced upon notice by the adverse party and not inspected or used in evidence by him does not render them admissible, if otherwise incompetent, on the part of the party producing them.

Assumpsit, to recover an account paid by reason of having indorsed a draft at the request, etc. Appeal from the Circuit Court of Cook County; the Hon. C. A. BISHOP, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed March 30, 1899.

Statement of the Case.—This suit was brought by appellee French against appellants, Marsh & Kenyon, copartners, to recover an amount which appellee had been compelled to pay by reason of having indorsed a draft at the request of one Unger, who, it was alleged by appellee, was an agent of appellants, and acted for them in this behalf. The contested issue of fact was as to the agency of Unger and his authority to bind appellants as his principals in the transactions with appellee.

In June, 1896, Unger passed through Chicago on his way to Kansas, where he was going for the purpose of buying horses. It was contended by appellee that while in Chicago appellants engaged Unger to purchase horses for them, and authorized him to draw upon them for that purpose. Appellants contended that they merely agreed to act as commission brokers for Unger in disposing of horses which he might

buy, and agreed to honor his drafts up to the amount of \$500 only.

It is undisputed that Unger, in the course of his transactions in buying horses, did draw on appellants, first for \$300 and then for \$800, each of which drafts was honored by appellants. The \$800 draft was indorsed by appellee. Later another \$800 draft was drawn, indorsed by appellee, dishonored by appellants, and it is this second \$800 draft which is the subject-matter of the suit here.

There was evidence supporting the contention of each of the litigants.

Unger, the alleged agent, testified positively and directly to the agency, and to facts which, if true, would establish his authority to thus bind appellants as his principals. Appellants testified as positively to the contrary thereof. There were circumstances tending strongly to support the evidence of Unger, and there were also some circumstances which tended to support the evidence of appellants. Before appellee indorsed the second \$800 draft, he took the precaution to learn that the first \$800 draft indorsed by him had been honored by appellants.

The jury found the issues for appellee. From judgment upon such verdict this appeal is prosecuted.

PADEN & GRIDLEY, attorneys for appellants, contended that the declarations of an alleged agent to third parties as to his agency can not bind the alleged principal. 1 Am. & Eng. Enc. 1032; Brigham et al. v. Peters et al., 1 Gray, 139; Bradner on Evidence (2d Ed.), 496; Sax & Bro. v. Davis, 81 Ia. 692; Pepper v. Cairns, 133 Pa. St. 121; Mechem on Agency, Sec. 100.

An agent who is authorized to draw drafts is not authorized to procure an indorser to bind principal or to negotiate the paper. Daniel on Negotiable Inst., Sec. 290; Ibid., Sec. 294; Gould v. Norfolk Lead Co., 9 Cush. (Mass.) 338.

AMERICUS B. MELVILLE and W. G. HATCH, attorneys for appellee.

Before the declaration of one claimed to be an agent can

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be admitted there must be proof of the agency, either by direct proof of the fact or by proof of such facts or course of dealings as will justify the inference that an agency exists. *Porter et al. v. Robertson*, 34 Ill. App. 74.

The principal is, as to third persons not having any notice of a litigation, bound by the ostensible authority of the agent, and can not avail himself of secret limitations upon the authority and repudiate the agency where innocent persons have in good faith acted upon the ostensible authority conferred by the principal. *Pa. R. R. Co. v. Atha*, 22 Fed. Rep. 924.

An agent may be deemed to possess all of the authority which may be required or become necessary to promote or secure the results intended to be attained in the business to be agreed on by him and by virtue of his employment. *Bickford v. Menier*, 36 Hun, 447.

The implied authority of an agent can only be accurately determined when it may not have been expressly limited by considering the employment in which he may have been engaged, and that is ordinarily the only means of obtaining the limits of his authority in this class of cases. In other words, his authority is limited only by the apparent extent of his agency. The nature and extent of the authority of the servant or agent are wholly deduced from the nature and extent of his usual employment; hence it is that the master is bound by the acts of the servants within the scope of the usual business confided to him; for the master is presumed to authorize and approve the known acts that are incident to such an employment, and that every such authority carries with it or includes in it as an incident all the powers which are necessary or proper or usual, as means to effectuate the purpose for which it was created. In this respect there is no distinction, whether the authority given to an agent is general or special, or whether it is expressed or implied. In each case it embraces the appropriate means to accomplish the desired end. *Story on Agency* (4th Ed.), Secs. 56 and 97; *Banks et al. v. Everest et al.*, 35 Kan. 687.

While the rule is that the agent must act within the scope of his authority, yet when the agent's acts affect the innocent third parties, the principal will be bound to the extent of the apparent authority conferred by him upon his agent. *Webster v. Way* (Neb.), 25 N. W. 207; *Thompson on Trials*, Sec. 1375.

MR. JUSTICE SEARS delivered the opinion of the court.

The issue of fact submitted to the jury was as to the alleged agency of Unger and his consequent authority to bind appellants. Upon that issue the evidence was so considerable and so directly conflicting that a court of review could hardly determine that a verdict for either litigant would be manifestly against the weight of the evidence. We are not prepared to say that the verdict as rendered is not sufficiently sustained by the evidence. We have, then, merely to pass upon questions relating to procedure. It is urged first, that the court erred in admitting, over the objection of appellants, evidence of conversations between Unger, the alleged agent, and appellee. It is contended that statements of Unger in such conversations, by which his agency was declared, could not be admitted to bind the alleged principals, appellants, who were not present. Nevertheless, we are of opinion that the trial court did not err in admitting the evidence of conversations and transactions between Unger and appellee. There being the direct and positive testimony of Unger as to the fact of the agency, it was proper to admit evidence of the transactions of the alleged agent in relation to the subject-matter in question, and if in the course of such transactions conversations occurred in which statements were made by Unger affirming his agency, the court could limit the effect of the evidence in this behalf by instructing the jury that such statements were not to be considered as evidence of the fact of agency. Doubtless the court would have given such an instruction had it been so requested. The agency could be proved by the testimony of the alleged agent. *Thayer v. Meeker*, 86 Ill. 470.

And after such proof was made, it was proper to admit

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evidence of the transactions and statements of the alleged agent in his dealings with appellee. The Ind. & St. L. R. Co. v. Miller, 71 Ill. 463.

If the declaration of Unger as to his agency had stood alone, not part of transactions which were material, then evidence of such declaration should have been excluded.

Secondly, it is urged that if the agency was established and an express authority shown to draw upon the principals for amounts needed to carry out the business of the agency, viz., the buying of horses, yet this would not carry with it an authority or power to procure an indorser of the drafts so drawn, and hence that the appellants are not obligated to appellee. As applied to the facts here, we can not assent to the contention. Nor do the authorities cited sustain it. The text and cases cited bear only upon the power of the agent to bind the principal by indorsing drafts in his name when the express authority is to draw only. Here the agent did as he was authorized, drew upon appellants, and we can not see that it is material whether he named as payee the party from whom he purchased the horses, the bank from which he received funds with which to pay for the horses, or appellee, who was keeper of a feed stable, was aiding in caring for the horses purchased, and who, being made payee in the draft, indorsed it to the bank which advanced the funds for the purchase of the horses.

If the evidence as to the fact of the agency and the authority to draw upon appellants is to be credited, then we are of opinion that Unger had power to bind the appellants to appellee upon the draft in question. *Mechem on Agency*, Sec. 311, *et seq.*; *Commercial Bank v. Norton*, 1 Hill, 501; *Bickford v. Menier*, 36 Hun, 446; *Doan v. Duncan*, 17 Ill. 272; *Noble v. Nugent*, 89 Ill. 522; *Crain v. Natl. Bank*, 114 Ill. 516.

The third contention is that it was error to admit evidence to show what prices the horses sold for in Chicago, and what prices appellants and others who bid in certain of them afterward realized on them through later sales.

The contested issue of fact involved the question as to

whether these horses were the property of appellants, bought for them by appellee, as their agent, or whether they were the property of appellee and merely sold by appellants as commission brokers. As circumstances bearing upon this issue and competent to be submitted to the jury, we are of opinion that it was proper to admit evidence to show that appellants in their own names, or upon joint account with others, bid in at the sale certain horses at a certain price, and afterward resold them at a comparatively much larger sum. In one instance a horse was thus bid in at \$107.50 and resold at \$1,000. It was not pretended that the sale at \$1,000 was for the benefit of Unger.

Fourth. It is urged that the drawing of the two former drafts, one of which was indorsed by appellee, as was the draft in question, was not a fact material or competent to go to the jury. The evidence disclosed that appellee learned that the draft previously indorsed by him had been honored by appellants before he indorsed this draft. We are of opinion that it was competent to thus show the previous transactions of these parties and that appellants had honored the former drafts. *Mabley v. Irwin*, 16 Ill. App. 362; *U. S. Y. Co. v. Mallory*, 157 Ill. 554.

Fifth. The objection to the last interrogatory in the deposition of Unger is not tenable. If anything improper had resulted in the answer, it could have been reached by specific objection to the answer.

The contention under the sixth heading has been already considered.

Seventh. It is objected that the deposition of one Bratton was not taken at the time named in the stipulation. The certificate of the notary public as to the taking of the deposition is not set forth in the abstract. We are therefore unable to determine what adjournments were had. The deposition was taken upon written interrogatories. Nor is the fact that the deposition was only returned to the court on February 23d, the day when the cause was set for trial, any sufficient ground for suppressing it. If any prejudice to appellants was likely to result from the late return

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of the deposition, the proper practice was to interpose a motion for continuance over the term, or for delay until preparation for trial could be made. This was done in this cause, and appellants were given until March 1st to prepare for trial, until which time the trial was postponed.

Under the eighth and ninth heads complaint is made of rulings of the court in giving and refusing instructions. Without going into a needless discussion of these rulings upon the instructions, it is enough to say that we find no error which we deem reversible, or which seems likely to have prejudiced appellants.

Tenth. Books of account were produced by appellants, upon notice by appellee, and were not inspected nor used in evidence by appellee. It was claimed by counsel for appellants that the notice to produce made them admissible. Had appellee, after having given notice to produce, inspected the books, a different question would be presented. But appellee did not inspect them, and we are not prepared to hold that the effect of the mere notice to produce, without inspection, operates to render admissible documentary evidence, otherwise incompetent.

Inasmuch as the evidence is sufficient to sustain the verdict, and as we find no reversible error in the record, the judgment is affirmed.

Frank D. Hyde v. The Casey-Grimshaw Marble Company, for the use of E. A. Sherburne, etc.

1. **JUDGMENTS—On Joint Obligations.**—The obligation of a partnership is joint, and not affected by the statute, R. S., Chap. 76, Sec. 3, entitled "Joint and Several Obligations." To warrant a judgment, all the members must be before the court.

2. **SAME—Against a Partnership.**—To warrant a valid judgment in attachment and garnishment proceedings against a partnership, the members of the firm must be sued jointly and all of them served with process, or be before the court.

Attachment and Garnishment Proceedings.—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge

82	83
87	638
185	680
82	83
890	186

presiding. Heard in this court at the October term, 1898. Reversed. Opinion filed March 10, 1899.

F. W. BECKER and DALE & FRANCIS attorneys for appellant.

E. A. SHERBURNE, attorney for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

E. A. Sherburne sued appellee in attachment, and William Grace and Frank D. Hyde, partners, under the firm name of Grace & Hyde, were named in the writ of attachment as garnishees. Frank D. Hyde only was served. Hyde, in his answer to interrogatories propounded to him and Grace as garnishees, admitted that Grace & Hyde, as partners, were indebted to the marble company, the defendant in attachment, in the sum of \$822.47. Such proceedings were had in the suit that November 11, 1893, judgment was rendered against the marble company for \$886.38 by default, from which \$314.10 was subsequently remitted, and June 7, 1898, judgment was rendered in favor of the marble company against Hyde alone, for the sum of \$822.48, \$704.14 of said amount being for the use of Sherburne, and the residue for the use of the marble company. In *Grace v. Grimshaw Marble Co.*, 62 Ill. App. 149, the judgment appealed from was against both Grace and Hyde, and the court held that it was void as against Grace for want of jurisdiction as to him, he not having been served, and that the judgment being a unit, if it was bad as to Grace it was also bad as to Hyde. Appellee's counsel now contends that "as Hyde only was served and Grace did not appear, the court had power to proceed against Hyde alone," citing *Courson v. Browning*, 86 Ill. 57. That was a suit on a bond, and a bond is, by virtue of section 3, of chapter 76 of the statutes, a joint and several obligation; but the obligation of the copartnership, Grace & Hyde, is a joint obligation, and not affected by the statute. It is an obligation of such character that, to warrant a judgment, all of the defendants must be before the court. In the case at bar it was neces-

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sary, to warrant a judgment, that the original attachment writ should have been served on both Hyde and Grace, because the statute authorizing a summons in the nature of a *scire facias* to make one a party to a judgment, has no application to such a case as the present. *Sandusky v. Sidwell*, 173 Ill. 493.

The appellee could only recover against Grace & Hyde by suing them jointly, and the plaintiff in the attachment occupies the same position as would the appellee if it voluntarily sued Grace & Hyde.

The judgment will be reversed.

82	85
181	334

James Reddick, Clerk, etc., and The Sanitary District of Chicago v. The People ex rel. Mason et al.

1. **THE SANITARY DISTRICT OF CHICAGO—A Municipal Corporation.**—The Sanitary District of Chicago is a municipal corporation; the board of trustees are its corporate authorities, and have full power to pass necessary ordinances, rules and regulations for the proper management and conduct of the business of such corporation, and for carrying into effect the objects for which it is formed, including the power of settling with contractors.

2. **SAME—The Clerk a Ministerial Officer.**—The clerk of the sanitary district is a mere ministerial officer, subject to the order of the board of trustees, and he can only act in pursuance of the order of the board.

3. **SAME—The Clerk can not be Compelled by Mandamus to Disobey the Legal Orders of the Board.**—Where the matter of an order is one resting in the discretion of the board, the exercise of this discretion can not be controlled by the court and the clerk can not be compelled by mandamus to disobey a legal order of the board.

4. **MUNICIPAL CORPORATIONS—When to be Compelled by Mandamus.**—When it is the clear legal duty of municipal authorities, vested with discretion in the premises to act, they may be compelled by mandamus to act, but not to act in any particular way.

5. **MANDAMUS—Does Not Lie to Compel a Violation of Duty.**—Mandamus does not lie to compel an officer to violate his duty.

6. **SAME—The Right Must be Clear.**—The right to the writ must be clear; in a doubtful case it will be refused.

Mandamus.—Trial in the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Judgment for relators on

demurrer; appeal by respondents. Heard in this court at the October term, 1898. Reversed. Opinion filed March 30, 1899.

Statement of the Case.—The appellees, Horatio P. Mason, Charles E. Hoge and others, filed a petition in the Circuit Court for a writ of mandamus to appellants. Appellants demurred to the petition; the court overruled the demurrer, and appellants electing to stand by their demurrer, gave judgment for the petitioners, to reverse which judgment this appeal is prosecuted.

The petition is somewhat lengthy, perhaps unnecessarily so, but the main facts alleged in it are as follows:

July 18, 1892, the Sanitary District of Chicago made a contract with Agnew & Co. for the performance by the latter of certain work on the main drainage channel of the district, which contract was assigned by Agnew & Co. to appellees January 17, 1894, with the consent of the sanitary district. June 25, 1897, the work contracted for having been completed, the sanitary district paid to appellees the sum of \$113,630.88, leaving unpaid on the contract the sum of \$15,000, which last sum was retained by the sanitary district as an indemnifying fund, to await the settlement of certain suits then pending against Agnew & Co. for claims arising prior to the assignment of the contract to appellees. Appellees signed and delivered to the sanitary district a receipt for the money so paid to them, which reads as follows:

“Know all men by these presents, that we, Horatio P. Mason, Charles E. Hoge, John King and Harry B. Hanger, copartners doing business under the firm name and style of Mason, Hoge, King & Company, of the city of Chicago, in the State of Illinois, in consideration of one (1) dollar to us in hand paid, the receipt whereof is hereby acknowledged, and of the full satisfaction to us (except to the amount of fifteen thousand (\$15,000) dollars retained for the purposes hereinafter mentioned) by payment of one hundred and thirteen thousand six hundred and thirty and eighty-eight hundredths (\$113,630.88) dollars, of which sum five thousand and eleven and forty-one hundredths (\$5,011.41) dollars is paid in full for extras, by the Sanitary District of Chicago, in full of all claims and liabilities

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arising in any manner out of the certain contract between the Sanitary District of Chicago and said Mason, Hoge, King & Company for the complete excavation and removal of all earth, rock, glacial drift, and other material from that portion of the main drainage channel of said district, known as section 8, which contract bears date of January 17, 1894, have released and waived and do hereby release and waive to said Sanitary District of Chicago, its successors and assigns, and forever discharge all liability for reserve percentage, extras, claims or demands of whatsoever kind or nature, arising upon said contract or in any manner connected therewith or relating thereto, excepting said fifteen thousand (\$15,000) dollars above mentioned, said sum of fifteen thousand (\$15,000) dollars being retained by said sanitary district, pursuant to the report of its judiciary committee and the action of the board thereon, to await the settlement or adjudication of certain suits in said report mentioned as an indemnifying fund, or until the further order of the board of trustees.

MASON, HOGE, KING & Co.

H. P. MASON.

By JOHN KING, att'y in fact.

H. B. HANGER.

By JOHN KING, att'y in fact.

JOHN KING.

Dated Chicago, June 25, 1897."

March 2, 1898, the board of trustees of the district, by adopting a report of its committee on judiciary, ordered that the sum of \$15,000 should be paid to appellees upon their filing with the district "proper receipts therefor and release in full of the district, to be prepared in the usual form in such cases." The petition alleges that March 14, 1898, the appellees made demand on James Reddick, who was and is the clerk of the sanitary district, for the payment of said sum of \$15,000, and offered to give him a proper receipt therefor, but that Reddick, although he had drawn warrants for the amount, refused to accede to the demand. Appellees, in a letter of date March 14, 1898, addressed to the president of the board of trustees of the district, notified him of the refusal of the clerk to pay them, and expressed a willingness to sign a modification of the receipt demanded of them, and inclosed a draft of a receipt

which they were willing to sign, and which, after acknowledging payment of the \$15,000, etc., concludes as follows:

"Have waived and released and do hereby waive and release to said Sanitary District of Chicago, its successors and assigns, and forever discharge it of all liability for reserve percentage, claims or demand of whatsoever kind or nature arising upon said contract or in any manner connected therewith or relating thereto, except for any demands we may have for interest on delayed payments thereunder, and we do also waive and release said Sanitary District of Chicago, of any and all claims or demands of whatsoever kind or nature arising out of or by reason of said contract for the work upon said section 8, excepting only demands on account of interest as aforesaid."

March 16, 1898, the engineering committee made a report to the board, which contains the following:

"The committee further recommends that the clerk of the district be and is hereby directed to pay said Mason, Hoge, King & Company, the said sum of fifteen thousand dollars as mentioned in the order of March 2, 1898, only upon the execution and filing with said clerk of the receipt and release in the form hereto attached."

Attached to this report was a form of receipt, which, after acknowledging payment of \$15,000, etc., concludes as follows:

"Have waived and released, and do hereby waive and release to said Sanitary District of Chicago, its successors and assigns, and forever discharge it of all liability for reserve percentage, claims or demands of whatsoever kind or nature arising upon said contract, or in any manner connected therewith or relating thereto, except for any demands we may have for interest on delayed payments as to said fifteen thousand dollars, and we do also hereby waive and release said Sanitary District of Chicago of any and all claims or demands of whatsoever kind or nature arising out of or by reason of said contract for the work upon said section 8, excepting only demands on account of interest, as aforesaid."

The board of trustees adopted the report and recommendation, thereby, in legal contemplation, ordering as recommended by the committee.

March 24, 1898, appellees made another demand for pay-

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ment on James Reddick, the clerk, and offered to give him a receipt in the following form :

“ We hereby acknowledge the receipt from the Sanitary District of Chicago of the sum of fifteen thousand dollars (\$15,000), being the amount directed to be paid to us by the board of trustees of said sanitary district at its meeting held March 3, 1898.

Dated Chicago, March 24, 1898.

MASON, HOGE, KING & Co.”

The clerk refused to pay unless appellees would execute a receipt as prescribed by order of the board March 16, 1898. Appellees took no further steps in the premises until the filing of the petition in question. The judgment of the court contains the following :

“ It is considered and adjudged that a writ of mandamus do issue to said James Reddick, clerk of said Sanitary District of Chicago, and to said Sanitary District of Chicago, commanding said clerk to forthwith receive said receipt tendered by petitioners, March 24, 1898, and to deliver to petitioners said warrants for said sum of fifteen thousand (\$15,000) dollars, or warrants for said sum in the usual form upon the treasurer of said sanitary district, and payable in cash, and commanding said Sanitary District of Chicago to again direct its said clerk to accept said last mentioned receipt from petitioners, and to make payment to them of said sum of fifteen thousand dollars (\$15,000) dollars directed to be made by its order of said March 2, 1898.”

The court also rendered judgment in favor of appellees and against the sanitary district for \$168.68, as interest on \$15,000 from March 14, 1898, to the date of the judgment.

F. W. C. HAYES and SEYMOUR JONES, attorneys for appellants.

Mandamus will not lie to compel the performance of an act by officers of a municipal corporation where such officers have discretion in the matter, but only where the parties applying for it show it to be the clear legal duty to perform the thing sought in the manner asked by the person or the body sought to be coerced. *People ex rel. v. Klokke et al.*, 92 Ill. 134; *County of St. Clair v. The People*, 85 Ill. 396; *Merrill on Mandamus*, Sec. 69.

The clerk of a municipal corporation has no authority to issue a warrant upon the treasurer of his municipality under the order of the board governing such municipality after such order has been rescinded, no matter whether the order has been rightfully or wrongfully rescinded. *The People ex rel. v. Klokke et al.*, 92 Ill. 134.

Mandamus does not lie to enforce contract rights of a private or personal nature nor is it the proper remedy to enforce the collection of debts. *Bradbury v. Mutual Reserve Fund Life Assn.*, 53 N. J. Eq. 306; *Bailey v. Oviatt*, 46 Vt. 627; *Parrott v. Bridgeport*, 44 Conn. 180.

The court exercises a discretion in issuing writ of mandamus and if the right be doubtful it will be refused. *People ex rel. v. Chas. A. Davis*, 93 Ill. 133.

PEDRICK & DAWSON, attorneys for appellees.

Two rules in regard to the issuance of a writ of mandamus are well settled by all the authorities upon the subject.

1. The party applying for it must show a clear legal right to have the thing, which is asked, done.

2. It must be the clear legal duty of the party sought to be coerced to do the thing he is called upon to do. *C. & A. R. R. Co. v. Suffern et al.*, 129 Ill. 281; *The People v. Crabb*, 156 Ill. 164.

The writ is no longer an extraordinary remedy in the sense in which it was formerly so considered, but should be issued where it will afford a proper and sufficient remedy. *Starr & Curtis' Rev. Stat.*, Ch. 87, Sec. 9; *People v. Village of Crotty*, 93 Ill. 186; *O. & M. Ry. Co. v. People*, 121 Ill. 490.

It will issue to enforce duty of municipality toward creditors. It is a proper remedy to enforce a ministerial duty. *Dillon, Mun. Corpsns.*, II, Sec. 349; *High on Extraordinary Remedies*, Secs. 351, 356.

MR. JUSTICE ADAMS delivered the opinion of the court.

It is evident from the facts alleged in the petition that there was a disagreement between the sanitary district and

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appellees as to the amount due to appellees, the sanitary district claiming that there was no interest due to appellees on account of deferred payments, and appellees claiming the contrary. Hence the order of March 2, 1898, is not an absolute order to pay to appellees the sum of \$15,000, but a conditional order, the condition being that appellees "shall have filed with the district the proper receipts therefor and release in full of the district," etc. This was clearly an offer of compromise, which appellees refused to accept, and, in lieu thereof, offered by their letter of March 14, 1898, to give a receipt waiving and releasing all demands arising out of the contract, except for interest on delayed payments. The sanitary district, on receiving this letter, while still claiming that appellees were not entitled to any interest on deferred payments, passed the order of March 16, 1898, that the \$15,000 should be paid to appellees only upon their filing with the clerk a receipt waiving and releasing all claims and demands arising out of the contract, excepting only demands for interest on account of delayed payments as to said \$15,000. This was also a conditional order, made by way of compromise, and not accepted by appellees. No absolute, unconditional order has been passed by the board of trustees of the sanitary district for the payment to appellees of the amount involved. The clerk of the sanitary district is a mere ministerial officer, subject to the order of the board of trustees; he can only act in pursuance of the order of the board, and it is too plain to require argument that had he paid appellees without requiring them to execute a receipt and release to the district, as provided by the board of trustees, he would have violated his duty. Mandamus does not lie to compel an officer to violate his duty. *People ex rel. v. Klokke*, 92 Ill. 134.

The judgment impliedly admits that the clerk could not have legally paid appellees under the orders set forth in the petition, except on condition that appellees would execute a receipt and release as prescribed by the board of trustees, because the judgment assumes to command the sanitary district to order the clerk to pay \$15,000 to appellees and

accept the receipt offered by them. We are of opinion that the court exceeded its jurisdiction in commanding the sanitary district to make any order or direction in the premises. The sanitary district is a municipal corporation; the board of trustees are the corporate authorities of the district. The act under which they are organized provides: "Said board of trustees shall have full power to pass necessary ordinances, rules and regulations for the proper management and conduct of the business of said board of trustees and of said corporation, and for carrying into effect the objects for which such sanitary district is formed." The powers conferred clearly include the power of settling with contractors. In the present case the board has determined, with probably more intimate knowledge of the subject-matter than the court possesses, that rather than leave any question of interest open, except the interest on \$15,000, which it does not admit, it will leave appellees to their legal remedy, and we do not think the court can compel the contrary. We think the matter is one resting in the discretion of the board, and that the exercise of this discretion can not be controlled by the court. *Kelly v. Chicago*, 62 Ill. 279; *People ex rel., etc., v. McCormick*, 106 Ib. 184; *People ex rel., etc., v. Kent*, 160 Ib. 655; *Board of Com'rs v. The People, etc.*, 78 Ill. App. 586.

It is well settled that when it is the clear legal duty of municipal authorities, vested with discretion in the premises to act, they may be compelled by mandamus to act, but not to act in any particular way. *People ex rel., etc., v. McCormick, supra*; *People ex rel., etc., v. Dental Examiners*, 110 Ill. 180; 14 Am. & Eng. Ency., p. 183, Sec. 9.

In the present case the court commands the sanitary district to pass an order directing the clerk to pay to appellees \$15,000, upon their signing a receipt for that amount. This is equivalent to the court, and not the board, making the order, and we do not understand that the court may lawfully thus force specific action by the board. It is also an admission that the orders heretofore made by the board do not constitute sufficient ground for the writ of mandamus,

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because if they did, no further order would be necessary. The right to the writ must be clear; in a doubtful case it will be refused. *People, etc., v. Johnson*, 100 Ill. 537.

The demurrer should have been sustained. The judgment will be reversed.

Charles Bonner et al. v. Knowlton L. Ames et al.

1. **WRITTEN INSTRUMENTS**—*Proof of Execution Under Verified Plea.*—Where the execution of an appeal bond is put in issue by a verified plea of *non est factum*, as provided by Section 34 of the Practice Act, the party offering the instrument is required to prove its execution, as at common law, before it can be read in evidence.

Debt, on an appeal bond. Trial in the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendants. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed March 10, 1899.

MASTERSON & HAFT, attorneys for appellants.

WALTER W. ROSS, attorney for appellees.

MR. JUSTICE SEARS delivered the opinion of the court.

This is an action in debt on an appeal bond. The appellants, defendants below, verified their plea of *non est factum*, by denial under oath of execution of the bond, as provided by Section 34 of the Practice Act.

The bond, which is the basis of the suit, was offered in evidence by appellees without any proof of its execution. Appellants objected "that no foundation had been laid for its introduction," and that it was incompetent. This objection was overruled, and appellants excepted to the ruling. The bond was admitted in evidence, and the trial resulted in verdict and judgment for appellees.

The bond should not have been admitted without proof of its execution by appellants.

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At common law, a party thus offering an instrument in evidence was required to prove its execution before it could be admitted. But, as a matter of convenience, and to lessen the expense of litigation, the General Assembly has dispensed with such proof, where copy of the instrument sued on is filed with the pleadings, unless rendered necessary by a plea denying the execution under oath. And when such denial is made, the party offering the instrument is then required to prove its execution, as at common law, before it can be read in evidence. *Zuel v. Bowen*, 78 Ill. 234.

The variance resulting from a mistake in the recital of the name of one of appellees in the declaration, can be cured by amendment before another trial.

The judgment is reversed and the cause remanded.

World's Columbian Exposition v. Pasteur-Chamberland Filter Co.

1. **DAMAGES**—*Loss of Profits from Advertising*.—Evidence of witnesses qualified by special experience and knowledge, to give their opinions as to the value of advertising spaces, is competent in view of the uncertainties of such a case.

2. **MEASURE OF DAMAGES**—*Matters Having no Market Value*.—In suits involving matters having no general market value, the measure of damages to be recovered is the value as shown by persons whose skill and experience enabled them to testify to such values.

8. **REVOCATION**—*Not Allowable After Approval*.—Where, under a contract, a party is to be permitted to place signs at drinking stations advertising a water filter, the general appearance and character of such signs being subject to the approval of the party of the first part, such party, after having approved the same, can not revoke his approval.

Assumpsit.—Breach of contract for advertising space. Trial in the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed March 30, 1899.

Statement of the Case.—Just prior to the commencement of the World's Fair in Chicago, appellant and appellee

entered into a contract by which appellant agreed to pay to appellee, for the use of not more than one hundred free drinking stations or fountains at the fair to be supplied by appellee, the sum of \$100 each, the stations to be supplied by appellee with reservoirs or tanks, faucets, drips, wastes and other necessary parts, and also as many Pasteur Germ Water Filters as might be necessary for supplying the required amount of drinking water at each of the stations; and also to care for and maintain in good working order all said stations from May 1 to November 1, 1893.

There are numerous provisions in the contract, but the following only is material in this case, viz.:

"Said party of the first part promises and agrees to permit said party of the second part to place signs at each of said drinking stations advertising the Pasteur Filter, its construction, mode of cleaning and maintaining same, and the address of said party of the second part; the general appearance and character of said signs being subject to the approval of said party of the first part."

The stations were erected and maintained by appellee as agreed, and paid for by appellant. Upon each side of each filter there was placed by appellee, in large and conspicuous letters, which remained throughout the exposition, the following sign, viz.:

"Free drinking water station No. 6. This water is filtered by (in large letters) the Pasteur Germ Proof Filter, and deprived of every dangerous material, but retains all of its natural salts and gases. The Pasteur is the only filter that is indorsed by all prominent scientists. Manufactured by the Pasteur-Chamberland Filter Company, Dayton, Ohio. Eastern Department, No. 4 West 28th street, New York. Chicago, 34 Congress street."

Between the first and middle of July, 1893, appellee placed on each tank two printed notices on cardboard, framed with glass, which described the method of manufacturing and operating the Pasteur Filter, its effect upon the water filtered through it, etc., etc., and stating "it is the only perfect filter, as it is the only germ proof filter made."

About the middle of each of these notices (or signs, as

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they are frequently called in the record by witnesses and counsel) and a part of the same, in large capitals and quite conspicuous, appeared the following :

"All water as it comes from springs, wells, cisterns, or streams, contains germs and other matters in suspension. A single disease germ may, under favorable conditions, become dangerous."

A copy of these notices or signs was submitted to and approved by Mr. Burnham, the chief of construction and director of works of appellant, about the last of May or first of June, 1893.

The notices were on the tanks when appellant paid appellee the agreed price therefor, and so remained until about the middle of August, 1893, when complaint was made to appellant that these notices were objected to by the Hygeia Waukesha Water Co., and were a violation of its contract with appellant to furnish water at the fair. Appellant then, through its engineer, notified appellee to remove the objectionable notices. Appellee failed to comply with this notification, and about ten days thereafter, appellant caused all the objectionable notices to be removed, but they have never been delivered nor tendered to appellee.

Appellee brought suit for a breach of the contract, claiming as damages the value of the signs and for being deprived of the privilege of advertising its filter under the contract. The declaration is a special count on the contract, and the common counts. The general issue was pleaded. A trial before the court and a jury resulted in a verdict and judgment for appellee of \$2,500, from which the appeal is taken.

Appellant asked, but the court refused to give, the following instructions, which, for convenience of reference, are numbered 1, 2, 3 and 4, viz. :

"1. If you find from the evidence that the plaintiff company could have kept its signs up by striking out the following words, 'all water as it comes from springs, wells, cisterns or streams, contains germs and other matter in suspension; a single disease germ may, under favorable conditions, become dangerous,' then the defendant is not liable for any damage for loss of advertising.

2. The only portion of the contract introduced in evidence, which gives to the plaintiff the right to place signs, is the following: 'Said party of the first part promises and agrees to permit said party of the second part to place signs at each of said drinking stations advertising the Pasteur filter, its construction, mode of cleaning and maintaining the same, and the address of said party of the second part; the general appearance and character of said signs being subject to the approval of said party of the first part.'

The court instructs you that under this contract the plaintiff had no right to put up any sign which contained any words or language reflecting upon the Waukesha or Hygeia Company, or upon any company claiming to furnish spring water, and if you find from the evidence that the sign in question contained the following language: 'All water as it comes from springs, wells, cisterns or streams, contains germs and other matter in suspension; a single disease germ may, under favorable conditions, become dangerous,' and that such language was a reflection upon spring water and a reflection upon the water claimed to be furnished by the Waukesha or Hygeia Company, then the court instructs you that the plaintiff had no right to place and maintain said signs, and the defendant company had the right to order them down; and if the plaintiff company refused to take them down, the defendant company could remove them without incurring any liability to the plaintiff for loss of advertising space or privilege.

3. You are instructed that the sign in question contains the following language: 'All water as it comes from springs, wells, cisterns, or streams contains germs and other matter in suspension; a single disease germ may, under favorable conditions, become dangerous.' That language does not fall within the terms of the contract, and the plaintiff company had no right under its contract with the World's Columbian Exposition to insert those statements in its sign.

4. You are instructed that even if you should find that the general appearance and character of said signs was approved by the defendant, or any of its officials, such approval does not bind the defendant as to any language in the sign which was a reflection upon the water furnished by other water companies, and the defendant company had the right, upon being notified, or upon discovering that the signs contained statements which reflected upon the water

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furnished by other companies, to order the objectionable statements removed."

WALKER & EDDY, attorneys for appellant, contended that the injury suffered, if any, was a loss of such profits as would have resulted from advertising—a matter of mere conjecture, depending upon the number who might read and act upon the advertisement. *Petrie v. Lane*, 58 Mich. 528, 25 N. W. Rep. 504; *Fitzsimmons v. Chapman*, 37 Mich. 139; *McKinnon v. McEwan*, 48 Mich. 106, 11 N. W. Rep. 828; *Allis v. McLean*, 48 Mich. 428, 12 N. W. Rep. 640; *Manufacturing Co. v. Pinch*, 91 Mich. 156, 51 N. W. Rep. 930; *Davis v. Davis*, 84 Mich. 324, 47 N. W. Rep. 555. It has been held in several cases the loss of profits may be recovered where the loss and the amount can be shown with certainty. But in this case the effect of this failure to advertise is most uncertain, and the court was correct in holding that such damages were not recoverable. *Sedgwick on Damages*, Sec. 170.

In a suit for breach of contract the court will not, for the measure of damages, apply a rule which would give plaintiff a greater compensation for a breach of the contract than he could receive had it been performed. *Olmstead v. Burke*, 25 Ill. 86.

It is a rule of pleading that where the damages sustained have not necessarily accrued from the act complained of, the plaintiff must state the particular damages he has sustained, to prevent surprise, or he will not be allowed to give evidence in respect thereto, and not then if remote.

So in an action brought to recover damages through failure to repair certain machinery. The trial resulted in verdict for plaintiff, which was reversed by the Supreme Court, the court saying:

This court has decided, in cases kindred to this, that the measure of damages is not prospective gains unless there should be shown outstanding contracts to be performed by the machinery to be furnished. There is no averment in the declaration of such, the only averment being that the

plaintiffs were deprived of the use of the still for two months, during which time they might and would have manufactured large quantities of alcohol, from which they would have derived great gains. This is all prospective, and too remote to be an element of damages. *Frazer et al. v. Smith*, 60 Ill. 145.

Calculations as to prospective profits in other enterprises which a party would have engaged in, had his contract with a defendant been fulfilled, are altogether too remote to form the basis of damages occasioned by the breach of such contracts. *Consumers Pure Ice Co. v. Jenkins et al.*, 58 Ill. App. 519; *Squire v. Western U. T. Co.*, 98 Mass. 232.

TUTTLE & GRIER and MONK & ELLIOTT, attorneys for appellee.

In an action for a breach of contract plaintiff is entitled to recover all such damages as are the certain result of the breach, even though such damage be uncertain in amount. *Meylert v. Gas Consumers Benefit Co.*, 26 Abb. N. C. 263.

The difficulties involved in estimating the injury done to an unknown author by a breach of a contract to publish his first book, do not preclude a recovery by him, or require the jury to render a verdict for merely nominal damages. *Bean v. Carleton*, 51 Hun, 318.

The measure of damages for a breach of a contract to deliver a note of a third person in payment for a chattel, is not the value of the chattel at the time of the sale, but the value of the note. *Bignell v. Waterman*, 5 R. I. 43.

On exchange of property for land warrants the damages for a failure to deliver the warrants is measured by the value of the land warrants, and not the value of the property given in exchange for them. *Rayner v. Jones*, 90 Cal. 78.

Where a railroad company in part consideration for a right of way granted to it, agrees to fence both sides of its road through the land granted, the measure of damages for a breach of such agreement is what it would reasonably cost the plaintiff to construct the fences. *Taylor v. Railroad Company*, 56 Cal. 317; *Railroad Company v. Wray*, 52 Ind. 578; *Railroad Company v. Lurton*, 72 Ill. 118.

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MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

Appellant claims, first, that the advertising privilege for which a recovery is sought, is not susceptible of being measured in damages, and, second, that appellant was entirely warranted, under the evidence, in removing the signs.

Under the first claim, it is argued that the trial court erred in the admission of the evidence of certain experts, two advertising solicitors, who testified as to the value of the spaces occupied by the signs in question as an advertising privilege, one testifying that these spaces were worth \$5,000 per month, and the other \$10,000 per month; that appellant did not sell advertising space, but permitted exhibitors, under certain conditions, to describe the goods they had on exhibition. No serious contention is made, nor could there be, that the witnesses were not qualified by special experience and knowledge, to give their opinions as to the value of the space. Counsel say, "the vital objection to this testimony is, that it is an attempt to apply the wrong measure of damages," and the court proceeded upon the theory that the question was the "market value of such advertising." Whatever may have been the theory of the learned trial judge, we are of opinion there was no error in the admission of this evidence.

Appellee had the right, under its contract, to advertise its filter at each of the stations by signs, and the character of such signs was subject to the approval of appellant. It had submitted the signs for that purpose to appellant, and they had been approved. It is true, on the matter of their approval there is a conflict in the evidence, but we are of opinion the weight of it is that the signs were approved. No useful purpose would be subserved by discussing it. Appellant wrongfully, as will be later seen, deprived appellee of the right to maintain these signs at the several stations for a period of more than two months of the fair, during which there was an attendance of more than 13,500,000 persons.

Can appellant deliberately violate its contract and then

say to appellee that because there is no way of proving the damages by reason of such breach, except by the opinions of experts as to the value of space for advertising purposes, it is without remedy? We think not, unless such is the inflexible rule of law. The opinions of experts are taken by the courts by reason of the necessity of the particular cases, in many matters of almost, if not quite, as great uncertainty as appellee's damages in this case, viz., as to the market price or value of houses and goods destroyed by fire, the value of personal services in the varied employments of business and professional life, including those of architects, physicians, brokers and attorneys, the values of annuities and life estates dependent upon the habits, health, physical condition and prospects of life of particular persons. Rogers on Expert Test., Sec. 156, *et seq.*; 1 Wharton on Evid., Sec. 446, *et seq.*

In *Meylert v. Gas Consumers Benefit Co.*, 26 Abbott's New Cases, 262, a physician was allowed to recover, on breach of a contract, what he might have earned as a physician during the time he was occupied in the performance of his part of the contract. Just what the evidence on which the allowance was based was, does not appear from the report of the case, except that it appeared he had averaged a certain income per month. This must have been for some past time, and was necessarily of an uncertain nature. The court said: "The plaintiff is entitled to recover all such damages as are the certain result of the breach, even though such damage be uncertain in amount."

See also the cases cited in the opinion of the court, and especially *Taylor v. Bradley*, 39 N. Y. 129, 144, in which a recovery was allowed for the breach of a contract which allowed the plaintiff to occupy and work a farm for three years, each party to furnish certain stock, tools, etc., and the plaintiff to have certain specified supplies for his family, and all proceeds to be divided equally between the parties. It was held *the value of the contract* was the proper measure of damages, though it could not be told whether the plaintiff would realize anything by performing it. The court,

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after enumerating the difficulties of making the proof, say: "The administration of justice frequently proceeds with reasonable certainty of accomplishing what is right, or as nearly right as human efforts may attain, in the face of similar difficulties, and it does so by making the experience of mankind, or rather, the judgment which is founded on such experience, the guide," and hold the value of the contract may be proved by the opinions of persons of experience and observation given in view of all the uncertainties of the case, and that the credibility of such evidence may be tested by cross-examination. Of like import is *Schell v. Plumb*, 55 N. Y. 592, in which plaintiff was allowed to recover, for the breach of a contract to support her for life, damages for her future support and maintenance, which, of course, depended upon her age, health, probabilities of life, and numerous other uncertainties, including the value of such services as she might in the future perform. Also *Rhodes v. Baird*, 16 Ohio St. 573-81, in which it was held that the market value of the use of premises was the proper measure of damages for the breach of a contract to make a lease of the same for a peach orchard to be grown, subject to the performance of the contract by the plaintiff, and if it had no general market value, its value could be shown by persons whose skill and experience enabled them to testify to such value, in view of the hazards and chances of the business to which the land was to be devoted.

Also in *R. R. Co. v. Douthet*, 88 Pa. St. 243, in which it was held there could be a recovery against the railroad company for the breach of its contract to give plaintiff a free pass over its road for himself and family for his lifetime; that the proper measure of damages was the value of such a pass. What the nature of the evidence to prove such value is, does not fully appear, but necessarily it must have been very uncertain.

Also in *Llewellyn v. Rutherford*, 10 L. R. C. P. 456-68, in which, for the breach of a covenant in a lease of a public house, the value of the good will was held to be the measure of damages, and that it should be ascertained by the evidence of persons accustomed to the trade of valuing.

We regard the cases cited by appellant as to the recovery of possible future profits, as not applicable, and the case of *Stevens v. Yale*, 72 N. W. Rep. 5, on which special reliance is placed, is of the same nature. The court say: "The injury suffered, if any, was a loss of such *profits as would have resulted* from advertising." The case at bar is to recover for the value of a space, which appellee had the right to use, of which appellant wrongfully deprived it.

We conclude that the evidence, though to a degree uncertain, as is generally the case on most questions of value of property, was competent and properly admitted. As to the second contention of appellant, that it was warranted in removing the signs, we have seen there was a conflict in the evidence as to whether they were approved by appellant, and that the weight of the evidence is that they were so approved. The only remaining question made is as to the right of appellee, under its contract, to have maintained the signs.

We are clearly of opinion that appellant having approved the signs, could not revoke such approval, and that this gave appellee the right to maintain them, including the alleged objectionable parts. We are, moreover, of opinion that the alleged objectionable part of the signs was legitimate advertising of the Pasteur Filter, to which appellee was entitled under its contract, especially so after the signs had been approved, and therefore all appellant's refused instructions, being based upon the theory that the objectionable words were a violation by appellee of its contract, were properly refused.

The judgment is affirmed.

Emma Wallen v. North Chicago St. R. R. Co.

1. ORDINARY CARE—*Exercise of, a Question for the Jury.*—The question as to whether a person failed to exercise ordinary care, and if so, whether such failure caused the accident, and also whether he exercised ordinary care, in view of the circumstances of the case, are questions to be submitted to the jury.

2. *SAME—Street Cars' at Street Intersections.*—A greater degree of watchfulness on the part of employes of street railway companies is necessary at street intersections, and when approaching such intersections, than under other circumstances.

3. *JURY—Motion to Take a Case from, Not Regarded with Favor.*—Motions to take a case from a jury are not to be regarded with favor, and when reasonable minds, acting within the limitations prescribed by the rules of law, might reach different conclusions, the evidence must be submitted to the jury.

4. *SAME—When a Case Should Not be Withdrawn from a Jury.*—A case should not be withdrawn from the jury unless the testimony is of such a conclusive character as to compel the court, in the exercise of a sound legal discretion, to set aside a verdict returned in opposition to it. The better practice in doubtful cases, is to submit the issues to the jury, and if upon full argument, on a motion for a new trial, the court becomes satisfied that the verdict is manifestly against the weight of the evidence, to set it aside and grant a new trial.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Verdict for defendant by direction of the court; appeal by plaintiff. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed March 30, 1899.

Statement of the Case.—This was an action by appellant against appellee, for alleged negligence in the management of its cars, by reason of which one of its cars collided with and injured appellant.

Appellant was a passenger on one of appellee's cars moving east on North avenue, which is an east and west street. The evidence is conflicting as to whether the car was a close or open one. Appellant had a little child with her between four and five years of age. She sat on the south side, and a little to the rear of the center of the car, facing east.

Appellee has two tracks in North avenue. The cars moving east run on the south track and those moving west on the north track. The distance between the tracks is about four feet. The cars are operated by electricity. When the car in which appellant was riding crossed Sheffield avenue, a north and south street on which appellant lived, it stopped to permit her to alight, which she did at the southeast corner of North avenue and Sheffield avenue, taking her child with her, when the car from which she had

alighted moved slowly away as she went around the rear end of it, for the purpose of crossing the street on her way to her residence on Sheffield avenue north of North avenue. She crossed the space between the two tracks, and when she reached the centre of north or west bound track, she became aware that a car was approaching from the east and was close to her, when she swung her child, whose hand she held, over the track and out of danger, but was unable to save herself, and was struck, as the evidence tends to show; by the north footboard or north side of the car moving west, and injured. The accident occurred between six and seven o'clock May 14, 1896. One witness testified that the car which collided with appellant was running at the rate of from twelve to fifteen miles per hour, another from fourteen to sixteen miles per hour. Several witnesses, who saw the accident, testified that they heard no bell or signal. The appellant testified that she heard none, and two witnesses testified positively that no bell was rung. Appellant testified that as she moved around the rear end of the car from which she alighted, she could see east a distance of two or three car lengths, and saw no car approaching.

The court, at the conclusion of the evidence for appellant, instructed the jury to find the defendant not guilty, which they did, and judgment was rendered on the verdict.

MORSE, IVES & TONE, attorneys for appellant.

Where street car tracks are in close proximity, and a train of cars is run in one direction at a rapid speed, without signal or warning, over a crossing, while a car bound in the opposite direction is discharging passengers at such crossing, and the view of the person is obstructed by the standing car, the jury are warranted in finding that such conduct on the part of the street car company is negligence. *Chicago City Ry. Co. v. Robinson*, 127 Ill. 9; *West Chicago Street R. R. Co. v. Nilson*, 70 Ill. App. 171; *The Chicago City Ry. Co. v. Wilcox*, 138 Ill. 370.

The decided weight of authority is that the failure of a person to look and listen before crossing the tracks of a

street railroad in a public street where the cars have not the exclusive right of way, is not negligence as a matter of law, as it might be if it were a steam railroad. *Evansville St. R. R. Co. v. Gentry*, 147 Ind. 408; *Robbins v. Springfield St. R. R. Co.*, 165 Mass. 30; *McClain v. Brooklyn City Ry. Co.*, 116 N.Y. 459; *Shea v. St. Paul City R. Co.*, 50 Minn. 395.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellee.

When the evidence given at the trial with all the inferences that the jury could justifiably draw from it, is so insufficient to support a verdict for the plaintiff that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. *Pleasants v. Fant*, 22 Wall. 120; *Randall v. Baltimore and O. R. R. Co.*, 109 U. S. 479; *Martin v. Chambers*, 84 Ill. 579; *Simmons v. Chicago & T. R. R. Co.*, 110 Ill. 340; *Lake Shore & M. S. R. R. Co. v. O'Conner*, 115 Ill. 254; *Bartelott v. International Bank*, 119 Id. 259.

MR. JUSTICE ADAMS delivered the opinion of the court.

Appellee's counsel contend that, as matter of law, on the facts in evidence, appellant was guilty of negligence, or want of ordinary care, which caused the accident, and therefore she can not recover. We are of opinion that whether the plaintiff failed to exercise ordinary care, and if so, whether such failure caused the accident, and also whether appellee exercised ordinary care, in view of the circumstances in evidence, were questions which should have been submitted to the jury. The east bound car on which appellant was a passenger had stopped for the purpose of permitting appellant to alight. That the car had stopped must have been apparent to appellee's employes in charge of the west bound car, on the hypothesis that they were looking ahead, as was their duty; and perceiving that the east bound car had stopped at a regular stopping place for taking on passengers, or allowing passengers to alight, they must have known that the car stopped for one of these purposes.

A greater degree of watchfulness on the part of street railway companies is necessary at street intersections, and when approaching such intersections, than under other circumstances. Booth on Street Railways, Sec. 306.

In *Kelly v. Hendrie*, 26 Mich. 255, the court (p. 261) say : "If, as represented by two of plaintiff's witnesses, the car was going at an unusual speed, the circumstance would have been of high importance if Mahan had been upon a street crossing, where it might have been the custom or the duty of the conductor to check or stop his car.

We regard the case of *C. C. Ry. Co. v. Robinson*, 127 Ill. 9, as conclusive that it can not be said, as matter of law, that appellant was guilty of negligence, or want of ordinary care, in attempting to cross the tracks as she did, and also as conclusive that the question whether the appellee was guilty of negligence which caused the accident, should have been submitted to the jury. Counsel for appellee seek to distinguish the case cited from the present, on the ground that the plaintiff sued as administrator of a minor aged six years, and that negligence could not be attributed to a child of that age. The distinction is clearly untenable because, as stated by the court in its opinion, the jury found that the minor exercised ordinary care (although it would appear that such finding was unnecessary), and also because the law announced by the court in that case is not limited to minors but is stated as of general application. Booth on Street Railways, top p. 429, note 7.

In *Offutt v. Columbian Exposition*, 175 Ill. 472, the court say of a motion to take a case from the jury: "It is true that such motions are not to be regarded with favor. The province of the jury must not be invaded (*Frazer v. Howe*, 106 Ill. 563), and when reasonable minds, acting within the limitations prescribed by the rules of law, might reach different conclusions, the evidence must be submitted to the jury." We can not say that the evidence in the present case is such that from it reasonable minds might not reach different conclusions. If the case had been submitted to the jury on the plaintiff's evidence, and the jury had found for

the plaintiff, we can not say that the question whether the verdict should have been set aside on the ground that it was not sustained by the evidence, would not have been a debatable question.

In *W. C. St. R. R. Co. v. Nilson*, 70 Ill. App. 171, a verdict rendered for the plaintiff under somewhat similar circumstances was sustained.

In *Roberts v. C. & G. T. Ry. Co.*, 78 Ill. App. 526, the court say: "A cause should not be withdrawn from the jury unless the testimony is of such a conclusive character as to compel the court, in the exercise of a sound legal discretion, to set aside a verdict returned in opposition to it (*Ry. Co. v. Johnson*, 135 Ill. 647), and we think it the better practice, in doubtful cases, to submit the issues to the jury, when, if upon full argument on motion for a new trial, the court becomes satisfied that the verdict is manifestly against the weight of the evidence, the court can set it aside and grant a new trial." What is here said is equally applicable when the question is whether the verdict is sustained by the evidence.

The judgment will be reversed and the cause remanded.

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Swift & Company v. Vincentz Rutkowski.

1. *VARIANCE—Between Declaration and Proof—Must be Specially Pointed Out.*—Where counsel in the trial court claimed there was a variance between the declaration and the proof, but did not point out specifically wherein the variance consisted, he will be precluded from claiming in the Appellate Court there was error in this regard.

2. *DECLARATION—One Good Count Sufficient.*—If there is one good count to which the evidence is applicable and which is sufficient to sustain the judgment, the error of the court, if any, in refusing to instruct the jury to disregard the other counts, is harmless.

3. *FELLOW-SERVANTS—Master's Negligence and That of Fellow-Servants, Concurrent Causes of an Injury.*—It is not sufficient to relieve the master from liability that his negligence and that of a fellow-servant were concurrent causes of an injury.

4. *SAME—Where Master's Negligence is Proximate Cause of Injury*

Swift & Co. v. Rutkowski.

—*Contributory Negligence of a Fellow Servant.*—Where the negligence of the master in not furnishing sufficient help to do his work is the proximate cause of an injury, it is sufficient to fix his liability, even if the negligence of a fellow-servant contributed to such injury.

5. ATTORNEYS—*Improper Remarks of Counsel—When Not a Reversible Error.*—Where it is apparent from the amount of the verdict, and from the fact that a former jury gave a larger one, that the jury were not unduly influenced by improper remarks of counsel, such remarks are not reversible error.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. GEORGE A. TRUDE, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed March 30, 1899.

Statement of the Case.—Appellee, a minor aged fourteen years, an employe of appellant, while engaged in trimming the tallow from the “pecks” of cattle in appellant’s slaughter house, on June 30, 1892, was injured by the carcass of a beef striking him, by reason whereof a knife, then being used by appellee, cut the muscles and tendons of his left arm, so that he has ever since been unable to use it or his left hand at any work.

A trial before the court and jury resulted in a verdict and judgment for appellee of \$5,000, which was affirmed by this court (67 Ill. App. 209), but was reversed and remanded by the Supreme Court (167 Ill. 156), because of an erroneous instruction.

A second trial resulted in a verdict and judgment, also for appellee, of \$2,200, from which this appeal is prosecuted. On the latter trial the case was submitted to the jury on the second additional count filed January 28, 1896, charging negligence in failing to employ a sufficient number of servants in and about slaughtering and dressing the cattle where appellee was employed, whereby he was injured, etc., and four additional counts filed July 15, 1897, the first of which charges the same negligence, and that appellee notified appellant of such failure, and that appellant promised to furnish a sufficient number of servants, and that appellee resumed work relying on the promise, but appellant failed

to keep its promise, whereby appellee was injured, etc.; the second makes, in substance, the same allegations as the first additional count of July 15, 1897, down to the promise, giving some different details, but instead of a promise, alleges that appellant ordered him to return to his work, that he obeyed and was injured, etc.; the third does not differ materially from the second additional count filed July 15, 1897, except that it alleges appellee was ignorant of the dangers of performing the work he was ordered to do alone; the fourth alleges the insufficient help, and that appellant failed to warn or instruct appellee of the work so that he might know and appreciate the danger of the same; that he was ignorant of the dangers, and while doing the work, not being warned nor instructed, was, by reason thereof, injured.

During the progress of the first trial appellee entered a *nolle prosequi* as to the original declaration and a first additional count filed January 28, 1896. Appellant pleaded the statute of limitations to the additional counts filed July 15, 1897, to which a demurrer was sustained, but no complaint is made by appellant in this regard. The court gave thirty-four instructions at appellant's request, but refused six instructions, one of which, to find the issues for defendant, was asked at the close of all the evidence, and the other five were asked at the close of the arguments with the instructions on the issues submitted to the jury, each of which, in substance, told the jury the plaintiff could not recover under one of the several counts on which the case was submitted, and as to such count they should not consider it in arriving at their verdict. The court also refused three other instructions of which no complaint is made.

Appellee's work consisted in cutting with a knife a thin fell, about the thickness of a newspaper, which lies over the fat of the peck, a part of the paunch, and then pulling off the fat with the hands. The pecks were trimmed while lying on the floor, and, while trimming, the appellee ordinarily stood in a stooping position with his face toward the floor and his eyes and attention directed there upon his work. Appellee had worked for appellant trimming pecks for about

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a month previous to the accident. For the first two weeks of his employment three boys were trimming pecks. For the next two weeks, two boys, one of whom was the appellee, trimmed the pecks until about three hours before appellee's injury, when appellee was required to do the work alone. On this latter point there is a conflict in the evidence, but we think it justifies a finding that, at the time appellee was injured, he was working alone trimming pecks, and by direction of appellant's foreman, and that, while working alone, he could not and did not keep up the work, and gradually fell behind, until, while doing his work, and in the usual stooping position, he was struck in the back by a carcass of beef which was being hoisted from the floor onto a hoist, and a knife held by appellee, in his right hand, was driven into his left arm, cutting it so severely that he is unable to use it, and is permanently injured. It is further shown that with two or three boys trimming pecks, the work was always safe to do and entirely free from danger, because such a number of boys was sufficient to keep the work up and be always thirty or forty feet away from the men moving or lifting the carcasses of beef or doing other work whereby the boys trimming pecks might be struck and injured. One boy could not safely do the work alone, because he could not work rapidly enough to keep the work up and would fall behind. As he fell behind the work became dangerous because of his coming in close proximity to the men moving and hoisting the carcasses of beef, and the liability to be thereby struck or hit by a moving carcass while working with a sharp knife used in trimming pecks.

It is further shown, as we think, by the preponderance of the evidence—at least it is not against the manifest weight of the evidence—that the failure to employ another boy to trim pecks at the time appellee was injured, was the proximate cause of his injury; that appellee was injured through no fault of his own; that he did not appreciate or understand the danger to which he was exposed while trimming pecks alone; that appellant knew appellee was left alone at the time he was injured; that appellee went to

Ledo Young, the foreman of appellant, and objected to doing the work alone, and Young promised to get more help; that Young did not do so, and appellee again went to Young and asked for additional help, and that Young told him that he (Young) would help him; that appellee, relying thereon, returned to his work; that no help was furnished, and shortly thereafter appellee was struck by a swinging carcass of beef and severely injured.

JOHN A. POST and JOHN B. BRADY, attorneys for appellant.

The declaration must state distinctly, and with certainty, every fact that is essential to the plaintiff's right of action. Ship. C. Law Pl. (2d Ed.), p. 203, Sec. 96.

The declaration must allege all the circumstances necessary for the support of the action. 1 Chitty, star p. 270.

On the strictness of the rule that allegation and proof must agree, see 1 Thompson on Negligence, p. 538, Sec. 30, note 9; Wabash W. Ry. v. Friedman, 146 Ill. 583; Bloomington v. Goodrich, 88 Ill. 558; Bell v. Senneff, 83 Ill. 122; Davidson v. Johnson, 31 Ill. 523; Moss v. Johnson, 22 Ill. 633; C., B. & Q. R. Co. v. Morkenstein, 24 Ill. App. 128; 1 Chitty Pl., 227; Stephen Pl., 236; Starkie Ev., 570, 572, 389; 1 Greenleaf Ev., Sec. 58; Derragon v. Rutland, 58 Vt. 128; McCormick Harvesting Machine Co. v. Sendzikowski, 58 Ill. App. 418, 72 Ill. App. 402; East Dubuque v. Burhyte, 173 Ill. 553; Meyers v. American S. B. Co., 64 Ill. App. 187.

E. S. CUMMINGS, attorney for appellee.

A variance between the declaration and proof should be pointed out at the time the evidence is offered. C. & A. R. R. Co. v. Byrum, 153 Ill. 131; Swift & Co. v. Madden, 165 Ill. 41.

If there be one good count to which the evidence is applicable, the error of the court, if any, in refusing to instruct the jury to disregard the other counts, becomes harmless. Consolidated Coal Co. v. Scheiber, 167 Ill. 539; Ill. Steel Co. v. Schymanowski, 162 Ill. 457; C. & A. R. R. Co. v. Anderson, 166 Ill. 575.

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The proximate cause may not be the sole cause of an injury. It need only be a concurring cause. It need not be alone the efficient cause, but only a cause without which the injury would not have occurred. Pullman Palace Car Co. v. Laack, 143 Ill. 242, and other cases above cited; Denver & R. G. R. Co. v. Bedell, 54 Pac. Rep. 280; Gonzales v. City of Galveston, 84 Tex. 3; Johnson v. Northwestern Tel. Co., 48 Minn. 433; City of Murphysboro v. Woolsey, 47 Ill. App. 447; Weick v. Lander, Adm., 75 Ill. 93.

To raise the point of an objection to argument of counsel, there must be a ruling of the trial court, to which exception is taken, or the objection will be ineffectual. North Chicago St. Ry. v. Schreve, 171 Ill. 440.

MR. PRESIDING JUSTICE WINDERS, after making the foregoing statement, delivered the opinion of the court.

It is claimed, first, that there was a variance between the declaration and the proof, and that on account thereof the court should have taken from the consideration of the jury the second count of January 28, 1896, and the second and fourth additional counts of July 15, 1897. At the close of the plaintiff's evidence appellant's counsel moved the court "to eliminate these counts from the consideration of the jury, and to exclude all evidence in the case as to these counts, upon the ground of variance," which was overruled. This motion was, in substance, renewed at the close of all the evidence, but at no time did counsel point out specifically, as he should have done, wherein the variance consisted. He is now precluded from claiming there was error in this regard. Swift & Co. v. Madden, 165 Ill. 41; Westville Coal Co. v. Schwartz, 177 Ill. 272; McCormick, etc., Co. v. Sendzikowski, 72 Ill. App. 402-9, and cases there cited.

Under his claim of variance appellant's counsel argued to the trial court, and does here, that these counts were faulty in that they failed to state a cause of action, and therefore, under section 51 of the Practice Act, which provides that "If one or more of the counts in a declaration be faulty, the defendant may apply to the court to instruct

the jury to disregard such faulty count or counts," his motion should have been allowed, and that the instructions regarding these counts, asked after the arguments, should have been given. This contention is not tenable. *R. R. Co. v. Blumenthal*, 160 Ill. 49; *R. R. Co. v. Warner*, 108 Ill. 548; *Ill. Steel Co. v. Schymanowski*, 162 Ill. 447-57; *C. & A. R. Co. v. Anderson*, 166 Ill. 575. In this last case the court say :

"The first, second, third and fourth instructions in substance directed the jury to disregard the first, second, third and fourth counts of the declaration. Section 51 of the Practice Act provides, that if one or more of the counts of a declaration are faulty, the defendant may apply to the court to instruct the jury to disregard such faulty counts. We are not prepared to hold that the counts are so insufficient as not to support the judgment, and if they are not sufficient the defects could not be reached by the instruction. But if the counts were so defective that they would not support the judgment, the error in refusing the instructions, if error it was, was harmless, as the declaration contained five counts, and it is not claimed that the fifth count is insufficient. If there is one good count to which the evidence was applicable and which is sufficient to sustain the judgment, the error of the court, if any, in refusing to instruct the jury to disregard the other counts, becomes harmless."

Counsel does not question the sufficiency of the first and third counts, filed July 15, 1897. No motion in arrest of judgment was made.

It is also contended that appellee was familiar with his work; that the danger to which he was exposed was open and apparent, and he therefore assumed the risk. Also that it is not alleged nor proven that appellee was induced by any promise of the foreman, Young, to continue his work, and that for all these reasons there could be no recovery; and the court should have instructed the jury to find the issues for appellant.

The first and third counts filed July 15, 1897, allege, in substance, that appellee relied on appellant's promise to furnish additional help, and there is evidence to support the allegation.

The evidence shows that appellee was familiar with his work, but as to whether the danger to which he was exposed was apparent to him, there was a conflict in the evidence, and from a careful consideration of it, we are unable to say that it does not support the verdict.

Appellant also argues that the verdict is against the weight of the evidence; that the alleged insufficiency of help was not the proximate cause of appellee's injury; that appellee and the man Beckman, who hoisted the beef that struck appellee, were fellow-servants.

It is immaterial, if such were the fact, that appellee and Beckman were fellow-servants. The gist of the negligence complained of is the failure to furnish sufficient help. Appellant can not escape its liability in this respect by a claim that the accident was also caused by the negligence of a fellow-servant. It is not sufficient to relieve the master that his negligence and that of a fellow-servant were concurrent causes of an injury.

The evidence in this case tends to show, and justified the jury in finding, that the negligence of appellant in not furnishing sufficient help to appellee to do his work, was the proximate cause of the injury, and that is sufficient to fix its liability, even if the negligence of a fellow-servant did contribute to the injury. *Pullman Palace Car Co. v. Laack*, 143 Ill. 259; *Chicago & A. R. R. Co. v. House*, 172 Ill. 601; *Leonard v. Kinnare*, 72 Ill. App. 145-51; since affirmed by the Supreme Court, 175 Ill. 532.

As to whether there was sufficient help, and whether appellant's foreman promised to furnish appellee additional help to aid him in his work, the evidence was conflicting and voluminous. We have examined it with care in the light of counsel's arguments, and can not say the verdict is manifestly against the weight of the evidence.

Appellant further claims that the court erred in allowing plaintiff's injured arm to be exhibited to the jury, and that the argument of appellee's counsel appealed to the prejudices and passion of the jury. The exhibition of the injured arm to the jury was a matter within the discretion of the court

and we are of opinion there is shown by this record no abuse of its discretion. *R. R. Co. v. Clausen*, 173 Ill. 100.

The argument of appellee's counsel, in which he stated that "if Swift & Company had been generous enough and humane enough to employ enough boys of the tender age of fourteen and fifteen years, that this boy might not have been hurt," was improper, and the court should have so ruled, but we think there is not reversible error in this respect. It is apparent from the amount of the verdict, \$2,200, when we consider the nature of the injury and the fact that another jury gave \$5,000, this jury were not unduly influenced from sympathy, passion or prejudice, either by the argument of counsel or the exhibition of the injured arm. The judgment is affirmed.

**George Barron, for the use of J. H. Poague, Receiver,
v. Wm. H. Burke.**

1. **RESIDENCE**—*Under the Attachment Act.*—Where a man has a settled and fixed abode, with the intention to remain there permanently for a time, for business and other purposes, in law, such abode is his residence, and is sufficient to constitute him a resident of this State under the attachment act.

2. **SAME**—*Within the Legal Meaning of the Term.*—There must be a settled, fixed abode, an intention to remain permanently, at least for a time, for business or for other purposes, to constitute a residence, within the legal meaning of the term.

3. **SAME**—*For What Purposes a Man May Have Two.*—Within the meaning of the revenue laws, and for the purpose of the attachment act, a man may have two residences, one in Illinois and one in another State.

4. **INSTRUCTIONS**—*As to Where the Preponderance of Evidence is.*—An instruction is erroneous, and cause for reversal, which tells the jury that the fact that the number of witnesses testifying on one side is greater than the number testifying on the other side does not necessarily alone determine that the preponderance of evidence is on the side for which the greater number testified; that in order to determine that question, the jury may take into consideration the appearance and conduct of witnesses while testifying, the apparent truthfulness of their testimony, or the lack of such truthfulness; their apparent intelli-

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gence or lack of it; their opportunity for knowing the facts and subjects concerning which they have testified, or the absence of such opportunity; their interest, or the absence of interest in the result of the case; and from all these facts as shown by the evidence, and from all the other facts and circumstances so shown, the jury must decide on which side is the preponderance.

5. ATTORNEYS—*Conduct in Argument*.—Attorneys should not allow their zeal for clients to cause them to say or do anything in the excitement of a trial which could be construed as unfair or calculated unjustly to prejudice their opponents.

6. SPECIAL FINDINGS—*Requirements of the Statute*.—The statute relating to special findings does not require that an answer to a special interrogatory be absolutely decisive of the whole case, but only that it relate to some material question of fact in the case, and that the fact must be ultimate, that is, a fact conclusive on some issue in the case.

Assumpsit, for commissions. Trial in the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Verdict and judgment for defendant. Appeal by plaintiff. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed March 30, 1899.

Statement of the Case.—Appellant began suit by attachment against appellee, declaring on the common counts, to recover for commissions claimed to have been earned by appellant as an importer's broker in making certain protests against the classification and rate of duties paid by appellee to the United States government on certain marble imported by him. The ground for the attachment was an alleged non-residence of appellee. The plea of general issue on the merits and one traversing the attachment affidavit were filed.

A trial in 1897 resulted in a verdict for appellant of \$5,000, which was set aside and a new trial awarded. A second trial was had in February, 1898, which resulted in a verdict for appellee upon the merits, but no general verdict on the attachment issue, though the jury made special findings, viz:

"1. Do you find from a preponderance of all the evidence in the case that the defendant, Burke, was not a resident of the city of Chicago, in this State, at the time of the swearing out and issuance of the writ of attachment in this case? No.

2. Do you find that defendant, Burke, was at the time of

the swearing out and issuance of the writ of attachment in this case residing in the city of Chicago, in this State? Yes.

3. Do you find from a preponderance of all the evidence in this case that in January or February, 1891, the defendant contracted and agreed to and with the plaintiff that defendant himself would pay the plaintiff twenty-five per cent of any refunds of duties paid by the defendant to the government, which defendant should recover or collect back from the government? No."

Appellant's motion for new trial was denied and judgment rendered against appellant for costs, from which this appeal is taken.

No instructions were asked by appellant, but the court, at the request of appellee, gave to the jury, among others, the following instructions, viz.:

"2. The court instructs you that the burden of proving that the defendant owed the plaintiff anything on any account when this suit was begun, and unless he has proved by the preponderance of all the evidence in the case that defendant was indebted to him at the time of the beginning of this suit, then the plaintiff can not recover, and your verdict should be in favor of the defendant.

5. The court instructs you that the plaintiff can not recover for anything that was not due when this suit was begun.

6. The court instructs you that even if you should find for the plaintiff you should not allow him interest on the amount claimed by him, unless you believe from a preponderance of all the evidence in the case that the defendant has withheld money from the plaintiff by an unreasonable and vexatious delay on his part.

7. The court instructs you that the fact that the number of witnesses testifying on one side is greater than the number testifying on the other side, does not necessarily alone determine that the preponderance of evidence is on the side for which the greater number testified. In order to determine that question, the jury may take in consideration the appearance and conduct of witnesses while testifying, the apparent truthfulness of their testimony, or the lack of such truthfulness; their apparent intelligence or lack of it; their opportunity for knowing the facts and subjects concerning which they have testified, or the absence of such opportunity; their interest, or the absence of inter-

est of the case; and from all these facts as shown by the evidence, and from all the other facts and circumstances so shown, the jury must decide on which side is the preponderance.

After fairly and impartially considering and weighing all the evidence in this case as herein suggested, the jury are at liberty to decide that the preponderance of evidence is on the side which in their judgment is sustained by the more intelligent and better informed, the more credible and the more disinterested witnesses, whether these are the greater or the smaller number.

10. The court instructs you that there are in this case two principal issues; one is what is called the attachment issue, which involves the question of whether defendant was a resident of this State at the time of the swearing out of the attachment writ in this case; and the court instructs you in regard to this issue that the burden of proving that defendant was not a resident of this State at the time aforesaid is upon the plaintiff, and if the plaintiff has failed to prove by a preponderance of all the evidence in the case on that point, the plaintiff was not a resident of this State at that time, your verdict on that issue should be for the defendant; so if the evidence upon that point is equally balanced, your verdict on that issue must be for the defendant. So also if the evidence upon that point fails to preponderate in favor of the plaintiff, your verdict upon that issue should be for the defendant.

11. The court further instructs you that the second principal issue in this case is whether the defendant was or was not indebted to the plaintiff, as claimed by the plaintiff at the time this suit was begun, and the burden of proving by the preponderance of all the evidence in the case that the defendant was indebted to the plaintiff, as claimed by him at the time this suit was begun, is upon the plaintiff; so if the plaintiff has failed to so prove by the preponderance of all the evidence, then your verdict upon that issue should be for the defendant; so if the evidence upon that issue is equally balanced, your verdict should be for the defendant; so also if the evidence upon that issue fails to preponderate in favor of the plaintiff, your verdict should be for the defendant.

12. The court instructs you that on the attachment issue in this case the plaintiff can not recover unless he has shown by the preponderance of all the evidence in the case, that defendant was not a resident of this State at the time the

attachment writ in this case was sued out, and unless the plaintiff has proven that defendant was not a resident of this State at that time, your verdict should be for the defendant on the attachment issue.

13. The court instructs you that if you believe from the evidence that the defendant, Burke, at the time the attachment writ in this suit was sworn out and issued, was established in business in this State, and he personally lived and abided here in this State, with the intention of remaining in this State permanently as a resident, for business purposes, then, in law, he was a resident of this State, and your verdict on the attachment should be for the defendant.

16. The court instructs you that where a man has a settled and fixed abode, with the intention to remain there permanently for a time, for business and other purposes, then in law, such abode is his residence."

JESSE A. and HENRY R. BALDWIN, attorneys for appellant.

The court erred in giving instruction No. 7. The instruction is misleading and prejudicial. The qualification as to the "apparent intelligence" of the witnesses was erroneous and prejudicial. *Weidemann v. Ryan*, 34 Ill. App. 568; *German Fire Ins. Co. v. Von Gunten*, 13 Ill. App. 593; *Purdy v. The People*, 140 Ill. 46.

S. S. PAGE, attorney for appellee.

Cases in support of what is claimed are *In re Alexander Thompson*, 1 Wend. 43; *Anderson's Law Dict.*, Title, Residence; "Residence is a fact; Domicile a legal conclusion from facts."

There is a marked distinction between residence and domicile. *Morgan v. Nunes*, 54 Miss. 311; *Baldwin v. Flagg*, 43 N. J. Law, 498; *Shinn on Attachment and Garnishment*, 149; *Alston v. Newcomer et al.*, 42 Miss. 192; *Frost & Dickinson v. Brisbin*, 19 Wend. 11; *Hanover Nat. Bk. v. Stebbins*, 69 Hun, 309.

Residence means abode or place where one actually lives, and not one's legal domicile. *Waples on Attachment*, 34 and 35; *Egener v. Juch*, 101 Cal. 105; *Andrews v. Mundy*, 36 W. Va. 29; *Story on Conflict of Law*, Sec. 44.

MR. PRESIDING JUSTICE WINDES, after making the foregoing statement, delivered the opinion of the court.

The reasons of appellant why the judgment should be reversed may be summarized, viz.: First. That on both issues the verdict and judgment are manifestly against the weight of the evidence; second, that incompetent testimony was admitted; and third, that erroneous instructions were given.

The evidence is quite voluminous, and has been carefully read and considered by us in the light of the arguments of counsel. Its discussion in this opinion could serve no useful purpose, in view of our conclusion, which is that upon the merits it is insufficient to support the verdict and judgment. Its clear preponderance, in our opinion, is with appellant.

As to the attachment issue, the evidence is sufficient to sustain the special findings of the jury, which are to the effect, in substance, that appellee was a resident of this State at the time of the issuance of the attachment writ. No point is made that there was no general verdict on the attachment issue, and it is unimportant in view of our conclusion on the merits.

As there may be another trial, we think it proper to notice a question of law discussed by counsel, viz.: What constitutes a residence in this State under the meaning of the attachment act?

We think the sixteenth instruction, which says, "Where a man has a settled and fixed abode, with the intention to remain there permanently for a time, for business and other purposes, then in law such abode is his residence," properly states the law as to what constitutes a residence in this State under the attachment act. *Board of Supervisors v. Davenport*, 40 Ill. 197; *Wells v. People*, 44 Ill. 40; *Wells v. Parrott*, 43 Ill. App. 656.

In the *Davenport* case, *supra*, Mr. Justice Breese, in considering the question as to what constituted a residence within the meaning of the revenue law, which provided for the taxation of property "of persons residing in this State,"

said: "There must be a settled, fixed abode, an intention to remain permanently, at least for a time, for business or other purposes, to constitute a residence, within the legal meaning of the term," and held that while the defendant's home or domicile was in New York, he had two residences, one in Illinois and one in New York. We think the same is true as to the attachment act.

In determining what was a residence under the attachment act, this court, in the Parrott case, *supra*, used almost the identical language of Justice Breese above quoted.

The court admitted, against appellant's objection, certain evidence relating to a former suit between him and appellee which had been dismissed for want of prosecution, and was claimed by appellee to have been for the same cause of action as the case at bar, though denied by appellant. It was in the nature of an admission and was competent. Appellant also objected to evidence admitted by the court as to certain cases tried by an attorney named Fry, for appellee, under a contract similar, as it was claimed by him, to what the arrangement was between appellant and appellee, and also the contract. We are unable to see the materiality of this evidence, but can not say that the error, if such it was, is sufficient for that reason alone to call for a reversal.

Numerous other objections are made as to the admission of evidence, that we deem of minor importance and not to require special mention. None of them are sufficient to require a reversal.

Also, it is objected in this connection, that the conduct of appellee's counsel in his remarks during the course of the trial, in the presence of the jury, in offers of different items of evidence, and in the examination of witnesses, was unfair to appellant and was calculated to prejudice him with the jury.

In view of the disposition we make of this case, it becomes unnecessary to consider these objections, further than to say that appellant is not without basis for criticism in this respect; that counsel should not allow their zeal for clients to cause them to say or do anything in the excitement of

trial which could be construed as unfair or calculated unjustly to prejudice their opponents. Justice can not generally be attained by any such means.

The objection to the second instruction is based upon its language as it appears in the abstract. A reference to the record shows that after the word "begun" at the end of its first clause, the abstract omits the words "is upon the plaintiff." When these words are supplied the instruction is correct.

The fifth instruction is not correct in that it would debar appellant from recovering any interest after the commencement of the suit, and conflicts with the sixth instruction, which would entitle appellant to recover interest if the jury found there was unreasonable or vexatious delay. The error, however, is not material on this record, the verdict being for appellee.

For the reasons stated in *Eastman v. Ry. Co.*, 79 Ill. App. 585, the majority of the court, not including the writer, is of the opinion that the seventh instruction is erroneous, and that the giving of it is cause for reversal, because it invades the province of the jury, by telling it what evidence is the strongest, to wit, the evidence of the more intelligent and better informed witnesses. The weight of the evidence is a matter to be determined solely by the jury.

It is claimed that instructions numbered 10, 12, 13 and 16 are all practically on the same point; that they are repetitions, and therefore cause for reversal. The same point is also made as to instructions 2 and 11.

We have seen that instruction 2 was a proper instruction. Instruction 11 is in part a repetition of No. 2, but adds points which were also proper. Instruction 11 made instruction 2 wholly unnecessary, but we should be loth to reverse for that reason alone. The same is true as to instructions 10 and 12, the latter being in part a repetition of the former. We find no such objection as to instructions 13 and 16. A further objection is made to instruction 16, that the use of the words "and other purposes" is not justified by any evidence in the case. The record tends to show that appellant's residence at Chicago was maintained

for social as well as business purposes, and we therefore think the use of these words was not improper.

It is claimed there was error in submitting to the jury the third special interrogatory, because an answer to it did not determine an ultimate fact in the case. Appellant sought to recover on a special contract, and also by reason of an alleged custom among brokers to pay a commission of twenty-five per cent for such services as he claimed to have rendered to appellee. The jury answered "no," to this interrogatory, and this answer therefore eliminated the latter basis of recovery from the case, and is consistent with the general verdict. Had the jury answered yes, it would have been inconsistent with the general verdict, and insufficient, under section 3 of the statute, to justify the court in disregarding the general verdict and rendering judgment for appellant on the special finding. The answer as it stands, would not be inconsistent with a general verdict for appellant, but such an answer would be a guide to the court as to what was the basis of such a general verdict, necessarily limiting the right of recovery to the custom among brokers.

We do not understand the statute relating to special findings to require, nor any decision of this or the Supreme Court to hold, that an answer to a special interrogatory must be absolutely decisive of the whole case, but only that it relate to some material question of fact in the case, and that the fact must be an ultimate fact, that is, a fact conclusive on some issue in the case. In the case of two counts on two promissory notes, each count being upon a separate note, where the defense was payment as to one of the notes, and want of consideration as to the other, it would be entirely proper to submit to the jury a question as to whether the one note was paid and another question as to whether there was any consideration for the other note.

We are of opinion this question was as to an ultimate fact in the case.

The judgment is reversed and the cause remanded, because as to the merits it is not sustained by the evidence, and because of instruction 7. Reversed and remanded.

John Gerson et al. v. Jacob DeTurck et al.

1. **SHERIFF'S RETURN—*Sufficiency of.***—A return of a sheriff, referring to the parties as the "within named defendants," is sufficient, as the within named defendants referred to, are beyond question the defendants named in the body of the writ.

2. **WORDS AND PHRASES—"Any" and "Either."**—The use of the word "either" instead of "any," in referring to the parties defendant in a sheriff's return, is immaterial.

3. **VERIFICATION—*Bill for the Appointment of a Receiver.***—The affidavit (for form, see post) verifying the bill in this case is held to be sufficient.

Interlocutory Order Appointing a Receiver.—Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the October term, 1898. Affirmed. Opinion filed March 30, 1899.

COPY OF SHERIFF'S RETURN REFERRED TO IN THE OPINION OF THE COURT.

"I demanded of the within named defendants, Rudolph Deimel and Ignatz Deimel, money or property to satisfy this writ, and they having failed to satisfy the same or any part thereof, and not being able to find any property of either of the within named defendants* in my county on which to levy, I therefore return this writ, no property found and no part satisfied, this 5th day of February, 1892. James H. Gilbert, Sheriff, by C. J. Jones, Deputy."

COPY OF AFFIDAVIT ATTACHED TO THE BILL IN THIS CASE.

"STATE OF ILLINOIS, }
County of Cook. } ss.

Robert C. Robinson makes oath and says that he is the agent for the complainants in the foregoing bill mentioned; that he has read the foregoing bill of complaint, and knows the contents thereof, and that all the averments in said bill, charging the recovery of judgments in favor of the complainants, Jacob DeTurck and John F. Brown, together with Willard S. Brown, since deceased, partners as Brown, DeTurck & Company, and Albert Hammacher, William Schlemmer and Charles F. Goepel, partners as Hammacher, Schlemmer & Company, and the issuing of executions thereon and placing the same in the hands of the sheriff of

* There were other defendants named in the writ.

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Cook County, Illinois, and the sheriff's returns thereon, are true, as in the said bill alleged, in substance and in fact.

That affiant has taken pains to inform himself as to the property of the principal defendants, Rudolph Deimel, Joseph Deimel, Simon Deimel, John Gerson, Ignatz Deimel and Rosa Deimel, and upon such information believes that said Rudolph Deimel, Joseph Deimel, Simon Deimel, John Gerson, Ignatz Deimel and Rosa Deimel, have property, real, personal and mixed, choses in action, which are held by other persons for them, or some of them, in fraud of the rights of complainants and the other creditors of said principal defendants, Rudolph Deimel, Joseph Deimel, Simon Deimel, John Gerson, Ignatz Deimel and Rosa Deimel, as alleged in complainants' bill of complaint, and which can not be reached by execution; and believes from such information that there are moneys due the said principal defendants, Rudolph Deimel, Joseph Deimel, Simon Deimel, John Gerson, Ignatz Deimel and Rosa Deimel, which can be reached and collected in this proceeding, if a receiver is appointed, which can not be reached by execution or garnishment proceedings, or any action at law, as in said bill is alleged.

ROBERT C. ROBINSON.

Subscribed and sworn to before me this 24th day of October, A. D. 1898.

[SEAL.]

R. M. ASHCRAFT,
Notary Public."

MR. JUSTICE SEARS delivered the opinion of the court.

This is an appeal from an interlocutory order appointing a receiver. The order was entered upon the showing made by the bill of complaint, which is an ordinary creditor's bill and is verified.

It is urged by counsel for appellant, that the order is erroneous, because, first, there is not a sufficient return upon the executions issued upon the judgments which are the basis of the creditor's bill; and, secondly, because the bill of complaint is not properly verified. We can not assent to either proposition. We are of opinion that the return of the sheriff is sufficient. The "within named defendants," referred to, are beyond question the defendants named in the body of the writ, and the use of the word "either"

instead of "any" is immaterial. *C., D. & C. Co. v. Kinzie*, 93 Ill. 415.

The bill alleges that certain property, which is described, has been fraudulently disposed of by some of the judgment debtors, and is now equitably subject to the payment of the judgment indebtedness. The affidavit verifying the bill of complaint avers the truth positively only of the allegations of the bill relating to the judgments and return of executions thereon, and the averments of the affidavit as to the truth of the allegations relating to the property fraudulently disposed of, and in which the debtors are said to have beneficial interests, are upon information and belief.

Taking the affidavit together with the allegations of the bill of complaint, specifying, as they do, particular property of the judgment debtors, we are of opinion that the chancellor was justified in ordering the appointment of a receiver. *Edwards v. Rodgers*, 41 Ill. App. 405.

We do not wish to be understood as holding that such a showing as to a beneficial interest of the judgment debtors in any property held by third parties, would be sufficient to warrant the court in interfering with the possession of such third parties. A very different and much more positive showing would be necessary before the court could properly disturb such apparent ownership of others by ordering the property into the hands of a receiver. But here the court has not ordered the receiver to take any such possession, and a hearing before a master in chancery has been ordered to disclose the facts regarding the various properties described in the bill of complaint.

Perhaps it would have been better practice to have waited until the evidence at the hearing disclosed with certainty just what interests in the property were equitably subject to the control of the court, before entering the order of appointment. But we are not prepared to hold that it was an abuse of discretion to enter an order appointing a receiver of the property in general of the judgment debtors upon the showing made of the judgments, the refusal to turn over property to satisfy execution, and the allegation that there was property specified in the bill of complaint,

in which they were beneficially interested, fraudulently withheld from the operation of the judgments, even though the allegations as to such property were made upon information and belief. As was said by this court in *Edwards v. Rodgers, supra*, "If the defendant and judgment debtor has any property or equitable interests not exempt by law from sale or execution, she ought to convey the same to a receiver, and this is all the order requires. If she has no property not exempt from execution, then there is nothing for the order to operate upon, and her assignment will transfer nothing."

It is true, as argued, that it has been held that where there is no showing whatever made of property upon which a receivership might operate, it is not necessary to appoint a receiver. *First Nat. Bank v. Gage*, 79 Ill. 207.

But here it is made to appear, by what we regard as a sufficient showing, that there is such property, and hence the *Gage* case cited, *supra*, does not control.

Upon a disclosure of all the facts, the court may not find it necessary or proper to order the property itself into the hands of the receiver, but may merely order the proceeds paid to the receiver so far as they may appear to inure to the benefit of the judgment debtors, and that can only be determined after the taking of the evidence at the preliminary hearing which has been ordered.

We can not say that there was an abuse of discretion in the entering of the order appointing a receiver of the property of the judgment debtors.

The order is affirmed.

North Chicago St. R. R. Co. v. William E. Allen.

1. VERDICTS—*When to be Sustained.*—When reasonable and fair-minded persons might differ in their conclusions on the evidence in question, the verdict will be sustained.

2. ELECTRIC CARS—*Care to be Exercised by the Motorman.*—The driver of an electric car, when he discovers persons driving ahead of

North Chicago St. R. R. Co. v. Allen.

him on the track, must exercise a higher degree of care than would be required of him under other circumstances, but ordinary care and prudence under the particular circumstances of this case, were all that is legally necessary to avoid liability.

3. JUDGMENTS—*When Substantial Justice Has Been Done.*—A judgment should be affirmed where substantial justice on the whole case has been done.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed March 30, 1899.

Statement of the Case.—Appellee was injured February 24, 1896, by a collision between appellant's electric car and his wagon while he was driving in the car tracks along Clybourn avenue, Chicago, some 200 to 250 feet north of Willow street, in a south-easterly direction, about 9:45 P. M. of that day. Appellant's car was going in the same direction as appellee was driving, and came up behind him and struck his wagon just as he was in the act of turning out of the car tracks to the left, after having discovered, by the singing noise of the electric wires overhead, that a car was approaching him from behind.

A trial before the court and a jury resulted in a verdict and judgment for appellee of \$1,000, from which this appeal is taken.

Appellant, among other instructions, asked the court to give the following instruction, which the court refused, viz.:

No. 10. "A company operating a street railway upon a public street is bound to use ordinary care for the safety of the people using the same. But on account of the cars of said company being confined to a fixed track and being unable to turn out for passing vehicles, it is the duty of persons driving upon the street when notified of the approach of a car to turn out for the passage of the same; and if the jury believe from the evidence that the plaintiff neglected to promptly turn out when he became aware of the approach of the car from behind, then they have a right to consider whether his neglect to do so was a lack of such care for his own safety as a reasonably prudent person would have exercised under similar circumstances."

The court modified this instruction by striking out the word "ordinary" in its first sentence and inserting instead thereof the words "a high degree of," and as thus modified the instruction was given.

The evidence as to the care of appellee and the negligence charged against appellant of running its cars at a high, reckless, careless, improper, unusual and unreasonable rate of speed, clearly preponderates in favor of appellee.

Appellee testified in part, viz.:

"On the evening of February 24, 1896, I was on Clybourn avenue north of Willow. I was on my way home, driving south or southeast on Clybourn avenue in a one-horse carpenter spring wagon. I heard the vibration of the wires over my head and looked back and saw a car coming, and I turned to the left to get out of the track, and on account of the snow piled up on the right-hand side of the track, I turned to the left, to the other side, and got the wagon partly out when the car struck the back end of the wagon, pitched myself and Mr. Biggs over to the sidewalk, smashed my wagon and broke my foot. When I looked back and saw the car coming I did not see any one at the motor in front of the car. The gong did not ring nor was there any signal given of the car coming. My horse was going in a trot. There were two tracks. I turned to the left on account of the snow being piled up right on the right-hand side. I could not get out, so I turned to the other track as the car struck the back end of the wagon. After I first looked, I looked again. I knew the car was going to hit me, and I hugged to the back end of the seat and kind of looked back at the same time and fetched the reins down beside the horse after she got headed out of the track. The horse went out of the track on a trot at the time. It was shortly before the car struck me that I looked back this second time. I was going southeast. The car was going the same way on the same track. Henry Biggs was with me. After the wagon was struck I had to put on four wheels, two springs, seat, a pair of shafts. The wagon was in good shape before the accident. It straightened both axles. The wagon was in front of the blacksmith shop; near the blacksmith shop after the accident. Partly on the sidewalk and partly in the street—on the left-hand side, east or southeast. Mr. Biggs was out of reach underneath the wagon, and I was right down near the horse, about the

horse's hips, and the horse was more to the right on the sidewalk. Before I undertook to get up I looked to see where the car was, and it was still in motion. It stopped down near Willow street, about 250 feet from where the wagon was struck. There was snow on the ground at the time. It was not dark; it was a pleasant evening. We could see quite a distance, possibly, I should say, a block; we could distinguish objects plainly. It was not storming at that time. The horse was going at the rate of six miles an hour. As soon as I knew that the car was coming I steadied the horse by taking the reins, but didn't slack her up any. I held the reins and at the same time steadied her. I turned her out and as I got her headed out I loosened the reins and slapped her along the hips with the reins. I had no whip with me that night."

On cross-examination he testified, in part, viz.:

"My wagon was in good condition at the time it was struck. The car hit it near the left hind wheel. The car struck the back end of the box and grazed along, as I saw afterward by the paint being knocked off; part of the car hit the left hind wheel. The wagon must have been nearly out of the track when the car struck it. The wheel was smashed. I can not say that the car hit it squarely; it hit it hard enough to leave a mark. I believe it broke one or two spokes and marked up the felloe. It simply went through the other hind wheel and the hub. Just after the accident I was lying, I should judge, eight or ten feet east, southeast as it may be, from where the wagon laid. I was thrown out on the right-hand side of the wagon. We were both thrown on the right-hand side of the wagon. The wagon was kind of sloping across the street. The horse was on the sidewalk altogether. I am not positive as to whether the horse was thrown down. It was either thrown onto my stomach or I was thrown onto her hips. The horse was scratched on one hind leg and generally shaken up. I kept her in the barn for some little time. I didn't use the horse only to exercise her out in the lot. I had my boy take her out into the lot, for two or three weeks anyway; she wasn't able to work. I was conscious all the time; I immediately tried to get up and went down again. I looked first to see the car going, and then I looked for Mr. Biggs, and when I seen where he was I made an attempt to go to him. I was sitting in the snow, and immediately after I was thrown out and struck the snow, I looked to see what did the work, and it was still in motion. It went probably

250 feet before it stopped. The first intimation I had of the car's approach was the hissing sound of the wires.' I looked back then and saw the car coming toward me; it was possibly fifty or one hundred feet away. I didn't see anybody upon the front platform of the car. I am not positive as to whether the head-light of the car was lit. I think it was, but I am not positive. I am positive there was no bell rung, either before or after the car passed. I don't really know how far nor how long I had been riding on Clybourn avenue before the accident. I had been riding on Clybourn, from where Racine runs into it, over to where I was hit. I had not been riding on the track all the way; I had been in the track some little distance; I can not give an idea how far. I drove out long enough for a car to pass, I know. I could not stand it to ride on and over such rough roads. It was rough outside, and then I turned into the tracks. I had not been in the track a great while before I was hit."

His comrade, Biggs, who rode on the wagon with him, says that when appellee started the horse with the lines he turned round to see what was the trouble, and saw the car coming right at the back of the wagon; that he did not hear the gong or bell ring; that they heard it on the other car and got out of the track then; that the horse was traveling on a fast trot; that they depended on the gong or alarm in order to get out of the track; that he was unconscious for some time after the accident, didn't know where he fell, was taken away and didn't see the wagon after the accident.

Louis Kahn, for appellee, testified :

"I was living at 438 Clybourn avenue. I heard a crash right, I should say, very near in front of the house that I lived in. I ran out to see what it was. I found one of the gentlemen, I don't know what his name is, lying under the wagon. I pulled the wagon off and helped him to the drug store. The wagon was lying, when I saw it, half on the side walk and the other half in the street near the curbstone. The wagon was lying partly on Mr. Biggs. I could hear the car going by the house. I did not hear any bell sounded. If it had been sounded I would have heard it. The wagon was broke but I don't remember what was broken on it. When I came out the car had not stopped altogether. I went down to Hoprick's saloon, I should judge it to be

pretty near 300 feet from where the accident happened. By the sound the car must have been going very rapidly or would have stopped sooner. I was sitting in the front parlor where I lived. I should judge as near as I can remember that it was a light night.

Cross-examination.

"I was sitting in my front parlor and the doors and windows were all closed. I know that the bell was not ringing, because if it had rung I could have heard it. I am sure the car ran way down in front of that saloon before it stopped. When I ran out to the injured man the car was just slackening up. My attention was not engrossed in the injured man, because the first thing I saw was the wagon, and the next thing I seen was the car. It had stopped at that time, because by the time I got up to help pull the man out the car had certainly stopped. I should judge it is 300 feet from where I lived up to Willow street."

William Kahn, who is a brother of Louis Kahn, testified:

"My first knowledge that anything unusual had occurred was I heard the crash. I ran outside to see what had happened; out to the sidewalk—out in front. I was sitting at the front window when I heard the crash, with my brother that has just testified. When I ran out to the sidewalk I saw the wagon laying at the curbstone, and saw Mr. Biggs lying underneath the wagon, and Mr. Allen laying a little bit further south, a little south of the wagon. The wagon laid partly on the sidewalk and partly in the street over the curbstone, in front of the blacksmith shop, on the east side of the street, the same side I lived on. The car struck the wagon about 436 or 438, almost in front of my house, between the two of them. This blacksmith shop is fifty feet from where I lived. At the time I came out, the car had not entirely ceased to run. I went outside and saw the car still going. It was still going at the time I went out. It was just slackening and coming to a stop. I noticed the wagon and noticed how they were laying and how they were hurt—the men. I know that the car bell did not ring on this evening previous to the crash. I am positive of that. If it had rung I would have heard it. I was at the front window, sitting by the front window, talking with my brother, I think. Besides us, my sister-in-law was there. We three were in the front parlor talking. The first notice we had of the accident was a crash. We all ran out at the same time as quick as we could. My place is a quarter of

a block from Willow street. The car stopped this side of Willow street, seems to me right by it. I don't recollect whether the whole car was north of Willow when it stopped or not; I didn't go up to look whether it was north or south. I noticed the car. I noticed and looked in front of the car, but I don't know how far it ran."

Mrs. Joseph Ficke, who lived at 426 Clybourn avenue, testified: "I had just retired. I heard a terrible crash, and then I got up out of bed;" also that as soon as she dressed she went out and saw the wagon about 200 feet from her house, part of it in the street and part on the sidewalk; that "the car went by our house about as fast as it could go;" that she heard no bell ring before she heard the crash, and would certainly have heard it had it rung; that the car was about 250 feet south of her house when she came out, and her house is 250 feet from the corner of Willow street. She is fully corroborated by her husband, who was in the house but had not retired.

Mrs. Anna Mosner, who lived at 430 Clybourn avenue, was sitting at her front window, and says: "I heard a crash and then I heard a car go by just as fast as it could go, and then I went out to see what was the matter. When I got outside the car was going. I looked after it and saw it stop near the corner up the street, near Willow street. I did not hear the noise of a bell or gong. I saw the wagon part the way on the sidewalk and part on the street." Her husband, who sat near her, corroborates her as to the crash, the location of the wagon and speed of the car.

For appellant, the conductor testified that the gong rang loud, as though something was ahead; that the wagon was then 200 to 300 feet from the car; that he gave the bell for Willow street 100 to 150 feet from Willow street for a lady to get off, and after that the car went fifty to seventy-five feet, and he noticed the car dip suddenly and come to a sudden stop which threw him against the door; the lady got off and he went through and asked the motorman what was the matter, and that "he said he struck a wagon;" that this was the first he knew there was an accident; that he then got off the car and went back to the wagon, which was

a car length and a half from the car; that the car started up again and stopped at the drug store near the corner of Willow street, where the other witnesses say it stopped for the first time after striking the wagon. He also said he didn't feel any shock or jar or hear any smash when the car collided with the wagon. He does not testify as to the speed of the car.

The motorman says he rang the gong all the time as he came down Clybourn avenue before the car struck the wagon; is indefinite as to the speed of the car, one time saying he "wasn't going at such a tremendous speed," at another, that he "wasn't going ten miles an hour, I am sure of that. I wasn't going nine or ten miles an hour; about four or five miles. If the wagon was going at the rate of five or six miles an hour, I don't think I would have struck it at all." Also, "I was not running as fast as the car could go. The car can go may be ten miles an hour. It can go twelve miles an hour." There is nothing in his evidence to indicate that the appellee did not exercise ordinary care for his own safety, except that he did not turn out from the ringing of the gong, but the appellee and his comrade both say they did not hear a gong ring. He also says, "I struck in the rear and threw them over in the other track. The car, after it struck the wagon, ran, maybe, twenty or thirty feet. After the men went in the drug store at the corner of Willow street, I pulled the car to the front of the drug store and stayed there until the conductor came out. I was about 150 feet away from the wagon when I got the view (of the wagon) by the headlight of the car. I was then ringing the gong steadily. I thought the men were going to turn out. The snow was kind of hard in spots, it was making the car slide a little." In another connection he says: "It was snowy weather, snowy, kind of soft that night, soft all day." Also, "The snow was soft at that time. It had been thawing that day or night. I know it was warm weather." As to the force of the collision with the wagon, he says: "I don't know whether it was smashed or not. I didn't hear it smash. I do not know

how far the wagon was thrown by the shock when the car struck it. I do not want to say how far. My best guess is it was over on the other track; that would be only about three feet. I didn't feel any tremor of the car, it didn't shake at all. I would not have known that the accident occurred if I had not seen it. It made a noise when it hit the dashboard. It did not make very much noise, just a little, gentle noise."

The United States Weather Bureau records show that the temperature at 7 P. M., February 24, 1896, was 31 degrees, and during the night it reached 38.6 degrees, and that no snow or rain fell that day or evening until 9:45 P. M., when it began to snow.

The witness Peak, for appellant, testified that he saw the accident; was going south on Clybourn avenue and was about twenty-five feet from the wagon at the time of the collision; that the car ran about three lengths after it struck the wagon; that the bell rung pretty hard, and it made him look around; the car was then about 125 feet from the wagon; that he saw the man (appellee) turn around and keep on a little ways, then started to turn out when the car hit the wagon. On cross-examination he says the car was "running just middling speed; it was not going very fast. It was not going full speed, that is one sure thing. I was not much judge about the railroad business at that time. I don't know how many miles an hour the car was going. I could not tell you anything about that." He also denied having made to appellee, and in presence of Ficke, contrary statements as to the gong ringing and the speed of the car. It also appears that at the time of the accident, this witness was out of employment "and had not been busy for a long time;" that about a week after the accident he was communicated with by an agent of appellant, or its lessee, and that soon thereafter he was given employment by appellant which he still retained at the time of the trial.

On rebuttal, Joseph Ficke testified that Peak, at the drug store, immediately after the injury, stated that the car was going full speed without any gong ringing at the time it struck the wagon. Appellee also testified that on March 11, 1896, Peak stated to him that he did not hear any bell or

gong sounded at all, and that the car was running very fast when it struck the wagon.

The only other witness, Schlihimer, called by appellant, as to the accident, said he was upstairs in his house, 413 Clybourn avenue, which is on the west side of the street, about 300 feet from where the wagon lay after the accident; that he ran down stairs when he heard the noise, and went to the place of the collision; that the car was then standing about half way between his house and Willow street, and that it moved up toward the drug store and stopped. On cross-examination he stated, among other things, viz.:

"I did not see the accident; I came there when it was over. I lived at 413 Clybourn. The wagon, when I found it, was right next door to a blacksmith shop on Clybourn avenue, on the east side of the street, about 300 feet from where I live. I heard the car when it struck the wagon. It was a pretty loud smash. I could hear it inside the house, and we didn't have our windows open. I didn't take notice of the car before it struck the wagon. I didn't hear it at all before it struck the wagon. I did not hear it after it struck the wagon, I seen it. I saw it after I got out. I didn't hear it any more. When I got out the car was not still in motion, the man was picking up the lamp."

ALEXANDER CLARK, attorney for appellant.

A street railway company is bound to use only ordinary care for the safety of persons in vehicles upon the streets. Booth on Street Railways, Sec. 309; Unger v. R. R. Co., 51 N. Y. 497; Chicago W. D. Ry. Co. v. Ryan, 131 Ill. 474.

An electric road is governed by the same rules as a horse railroad. C. & P. St. Ry. Co. v. Meixner, 160 Ill. 320. Also a cable road. Rack v. City Ry. Co., 173 Ill. 289.

What is ordinary care depends upon the circumstances of each case. W. C. St. Ry. Co. v. Manning, 170 Ill. 417; C. & A. R. R. Co. v. Adler, 129 Id. 335.

JESSE A. & HENRY R. BALDWIN, attorneys for appellee.

MR. PRESIDING JUSTICE WINDES, after making the foregoing statement, delivered the opinion of the court.

The only points argued by appellant's counsel in his brief

are that for the failure of appellee to show ordinary care, the court should have instructed the jury to find for appellant, and that the court erred in modifying the instruction quoted in the statement, and given as modified as instruction ten.

We are clearly of opinion that the evidence relating to the care exercised by appellee was such that it could not be said, as matter of law, he was not in the exercise of ordinary care for his own safety, but that this was a question peculiarly for the jury, on which they were fully instructed. Reasonable and fair-minded persons might well differ on this point in their conclusions on this evidence. We think the evidence sustains the verdict in this respect. *Penn. Co. v. Frana*, 112 Ill. 398; *Ry. Co. v. Manning*, 170 Ill. 421; *Offutt v. Columbian Exp'n*, 175 Ill. 473, and cases cited.

The modification of instruction ten by the court was error. It should have been given as asked. While it may be said that the care which it was incumbent on appellant's servant to exercise when he saw that appellee was driving ahead of him on the tracks, was a higher degree of care than would have been required of him under some other circumstances, still ordinary care and prudence under the particular circumstances were all that were legally necessary to avoid liability to appellant. 1 *Thompson on Neg.*, 396, n. 2, and cases cited; *Booth on St. Rys.*, Secs. 305 and 309, and cases cited; *Ry. Co. v. Ryan*, 131 Ill. 474; *Ry. Co. v. Manning*, 170 Ill. 427-31; *Roller v. Ry. Co.*, 66 Cal. 230; *Ry. Co. v. Witten*, 74 Tex. 202.

But notwithstanding the error in this instruction we are of opinion, after the most careful consideration of the evidence, that with a proper instruction, the jury could not have reached a different conclusion than they did as to appellant's negligence as to the rate of speed of its car, and that by reason thereof appellee was injured. We have set out with some particularity in the statement the evidence bearing upon the rate of speed of the car. No disinterested and fair-minded person could read the evidence without, in our opinion, reaching the conclusion that appellant's car was being run at a high, reckless and unreasonable rate of speed,

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and that this is shown by the clearest preponderance of the evidence. There is practically no dispute that after the accident, the wagon, a long carpenter's wagon, was thrown, by the force of the collision, from one track across another and partly onto the sidewalk, and that the noise of the crash was heard by at least five disinterested persons in their houses, some distance away, with closed doors and windows, and also that after the collision the car ran from 150 to 250 feet before it came to a stop. The testimony of the conductor that the first he knew that there had been a collision was when he was told by the motorman, and that it only made a little, gentle noise, and he felt no tremor of the car, might very properly have been disregarded by the jury. The motorman is very indefinite and conflicting in his statements of the speed. The witness Peak's evidence, was certainly not of much weight, considering his contradictory statements testified to on rebuttal. Appellant's own witness, Schlihimer, says he was 300 feet away, inside his house, with windows not open, and heard the crash of the collision.

Had the speed of the car been slackened to a reasonable rate, we think it clearly apparent there would have been no accident.

Another trial could only, in our opinion, result in a verdict for appellee. No complaint is, and could not reasonably be, made as to the amount of damages. A judgment should be affirmed where substantial justice on the whole is done. *Lebanon, etc., Ass'n v. Zerwick*, 77 Ill. App. 491, and cases cited; *Ry. Co. v. Wilson*, Id. 608.

The judgment is affirmed.

George Slingo v. Steele-Wedeles Company.

1. **PROMISSORY NOTES**—*Demand Before Suit, When Unnecessary.*—For some purposes a note payable on demand is due as soon as it is executed and delivered to a *bona fide* holder. A suit may be maintained upon it without any demand for payment other than the commencement of the suit.

2. *SAME—Demand Before Foreclosure Necessary.*—Where it is sought to foreclose a chattel mortgage, given to secure the payment of a note due on demand, the note and mortgage are to be considered and construed together, and in case it is sought to enforce a forfeiture, a previous demand for payment is necessary.

3. *CHattel MORTGAGES—Forfeiture Under an "Insecure and Unsafe" Clause.*—In judging of the contingency under the "insecure and unsafe" clause of a chattel mortgage, the mortgagee, in taking possession of the property, must act in good faith, and have reasonable grounds to suppose that there was danger of his debt being lost.

Trespass, de bonis asportatis. Trial in the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Verdict and judgment for defendants by direction of the court; appeal by plaintiff. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded. Opinion filed April 11, 1899.

Statement.—At and prior to March 28, 1895, the time of the alleged trespass complained of in this case, appellant was conducting a retail grocery store at Western Springs in Cook county. Appellee was a wholesale grocer in Chicago. Appellant was then indebted to appellee in the sum of about \$200. March 27, 1895, another creditor of appellant caused an attachment to be levied upon the stock of groceries in appellant's store. The next day Edward Lloyd, representing appellee, went to the store of appellant and obtained from appellant a chattel mortgage upon his stock of groceries, and also upon his cow and other exempt property. At the suggestion and upon the instance of Mr. Lloyd, an appraisal of the property attached was had, and thereupon such property was released from the attachment levy as being exempt, and the possession thereof surrendered to appellant by the constable who had levied the attachment thereon.

A few minutes afterward another constable stepped into the store and took possession for appellee under said chattel mortgage. The next day all of the mortgaged property was sold, as contended by appellee, at private sale, for \$140. This included a horse, wagon, cow, fixtures, etc., besides the stock of groceries. The day next following it was all removed by the agents of appellee.

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The chattel mortgage is dated March 28, 1895, was executed and acknowledged that day, and was given to secure the payment of two promissory notes made by appellant of even date with said mortgage, one for the sum of \$100, payable *on demand*, and for the sum of \$90, due one year after date. No demand was ever made upon appellant for the payment of either of said notes.

ROGERS & MAHONEY and FREDERICK A. WILLOUGHBY, attorneys for appellant.

Before the plaintiff's goods could be taken for failure to pay the note, actual demand should have been made upon him. While a note payable on demand is considered due without a demand in fact, so that an action can be maintained upon it, and the statute of limitations will run against it, yet it can not be maintained that the same rule applies to a note given for the purpose of extending some term of credit, and the term of credit being at the option of the holder, if a forfeiture is to follow, an actual demand, or notice in some way that payment is wanted, should be proved. *Pulling v. Travelers' Insurance Co.*, 55 Ill. App. 460; *Travelers' Ins. Co. v. Pulling*, 159 Ill. 607; *Basse v. Gallegger*, 7 Wis. 442; *Marine Bank v. Internat. Bank*, 9 Wis. 57; 8 Am. and Eng. Enc. L., title Forfeiture, Sec. 28, page 448.

In order to foreclose this mortgage by virtue of the "insecurity clause" therein, the mortgagee must have felt "insecure or unsafe" and have had reasonable grounds therefor. *Roy v. Goings*, 96 Ill. 361; *Furlong v. Cox*, 77 Ill. 293; *Newlean et al. v. Olson*, 22 Neb. 717.

The feeling of insecurity must also have been produced by some subsequent cause, or some cause not in being when the mortgage was executed. *Roy v. Goings*, 96 Ill. 368; *Barnett v. Hart*, 42 Ohio St. 41.

MORAN, KRAUS & MAYER, attorneys for appellee.

The right to take possession under a chattel mortgage securing a demand note, exists at any time without prior demand for payment of the note. *Jones on Chattel Mort-*

gages, Sec. 770 (3d Ed.); *Field v. Nickerson*, 13 Mass. 131, 136; *Alden v. Lincoln*, 13 Metc. (Mass.) 204, 209; *Whittemore v. Fischer*, 132 Ill. 243, 256; *Southwick v. Hapgood*, 10 Cush. (Mass.) 119.

MR. JUSTICE HORTON delivered the opinion of the court.

The foregoing statement is sufficiently explicit to present the questions upon which we dispose of this appeal. The various charges of fraud and deception have been intentionally omitted.

It is contended on behalf of appellant that appellee can not justify the seizure of appellant's property under said mortgage, first, because no demand was made upon the note which was payable on demand, and, second, because there is no evidence that the mortgagee had reasonable grounds to feel insecure or unsafe. Both of these contentions are well founded.

For some purposes a note payable on demand is due as soon as it is executed and delivered to a *bona fide* holder. A suit may be maintained upon such a note without any demand for payment other than the commencement of the suit. But where it is sought to foreclose a chattel mortgage given to secure the payment of a note due on demand, the note and mortgage are to be considered and construed together. In such a case, and where it is sought to enforce a forfeiture, a previous demand for payment is necessary.

The case of *Pulling v. Travelers' Ins. Co.*, 55 Ill. App. 452, was commenced to recover upon a life insurance policy. In the policy it was provided that "if any premium on this policy, or any installment thereof, or any note given for the premium, or any part thereof, shall not be paid on or before the day specified for the payment of the same, then this policy shall cease and determine," etc. Instead of paying the premium upon said policy, due July 15, 1880, the insured gave his promissory note therefor, payable on demand. Whether a demand for the payment of this note was ever made was a contested question of fact. When the next premium became due the insured caused a tender to be

made of the amount due upon said note and the premium then due. The company refused to accept the tender on the ground that the policy was forfeited. Mr. Justice Gary, speaking for the court, says (p. 460):

“While a note payable on demand is considered due without a demand in fact, so that an action can be maintained upon it, and the statute of limitations will run against it, yet it can not be maintained that the same rule applies to a note given for the purpose of extending some term of credit; and the term of credit being at the option of the holder, if a forfeiture is to follow, an actual demand, or notice in some way that payment is wanted, should be so proved, that from the facts as detailed by the witnesses the court can see that such demand was made or notice given.”

In the same case in the Supreme Court (*Travelers' Ins. Co. v. Pulling*, 159 Ill. 603, 607), the rule is very concisely stated thus: “The note executed for the premium, being payable on demand, could not be regarded as matured for the purpose of forfeiture, except by a demand of payment from the maker.” The assured died in 1890, ten years after the demand note was given, no premiums having been paid in the meantime, and the beneficiary named in the policy, the wife of the assured, recovered.

The principle upon which the Pulling case is decided is the same as in the case at bar. The word “forfeiture” is not now used in law with the same limitations, or restricted or applied to real estate only, as in early times. It means the divesting of property, or the termination of a right. It will hardly be contended that appellant was not divested of property and his right thereto and to the possession thereof by the seizure and sale of same under the mortgage, and in the manner shown by the testimony.

In considering this question of demand, counsel for appellee cite *Whittemore v. Fisher*, 132 Ill. 243, 256. We need only to say in regard to that case, that a formal personal demand was in fact made, and that that not being complied with, the goods were taken upon a replevin writ.

Second. Is there evidence to sustain the act of appellee in seizing and selling the property in question under the “insecure and unsafe” clause of the mortgage?

There was no change in regard to the property or the security of appellee between the time of the giving of the mortgage and the seizure and sale of the property of which appellee could complain. The only change was that the attachment levy upon a part of the property embraced in the mortgage had been released. That release of levy was upon the ground and for the reason that under an appraisal the property was found to be exempt. There was no cause to feel unsafe or insecure which was "not in being at the time the mortgage was executed." As held in *Roy v. Goings*, 96 Ill. 361, 368, no legal ground existed upon which to base a claim for feeling unsafe or insecure. It had been determined that the property was exempt, and therefore no one could interfere with the lien or claim of appellee by virtue of the mortgage.

In the *Roy v. Goings* case, the court, in speaking of the construction to be placed upon the "insecure and unsafe" clause as to the right of the mortgagee to take possession, lay down the rule that "in judging of that contingency he must act in good faith, and must have reasonable grounds to support his belief. He must have probable cause for his belief. As was said in *Furlong v. Cox*, 77 Ill. 293, he must, in good faith, based upon reasonable grounds, believe there was danger; and again, that he must have reasonable grounds to suppose that there was danger."

We are unable to discover in the testimony in this case any reasonable grounds upon which appellee, or those representing it, could, "in good faith," believe there was danger.

As this case must be reversed and remanded for the reasons indicated, we do not feel called upon to discuss or express any opinion as to the various charges of fraud and misrepresentation. We are, however, of opinion that the case should not have been taken from the jury.

The judgment of the Circuit Court will be reversed and the cause remanded.

F. A. Smith v. William O. Wallace and Frank S. Fredericks, Partners under the Name of Wm. O. Wallace & Co.

1. **GARNISHMENT—Unascertained Indebtedness—Breach of Contract.**—The fact that a person is guilty of a breach of contract does not necessarily render him liable to garnishee process; damages must be ascertained and fixed by a judgment or otherwise, before an indebtedness exists sufficient to render such person liable to this process.

Garnishment.—Trial in the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Finding and judgment for defendant; appeal by plaintiff. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed April 11, 1899.

MALCOLM DALE OWEN and HUGH V. MURRAY, attorneys for appellant.

CHARLTON & COPELAND, attorneys for appellees.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

Appellant recovered a judgment by confession against one George W. Smales and wife, and caused garnishee process to be served upon appellees, claiming that the latter were indebted to the Smales in the sum of \$500. Appellant's counsel thus state the grounds upon which it is sought to maintain the action: "Appellees had made with the Smales a distinct agreement to perform a certain covenant upon a definite contingency. The contingency arose and appellees failed to perform their covenant. They thereupon forthwith became liable to said Smales, at least for the sum of \$425."

This assumes that because appellees are alleged to have broken a contract with the Smales to loan them \$500 upon certain contingencies, which it is claimed transpired, an indebtedness to that amount in favor of the Smales was thereby created.

The suit is based upon an entire misapprehension. If appellees were guilty of a breach of contract, the Smales had their remedy in an action for damages, if any were thereby occasioned. Unless such damages are ascertained and fixed by judgment or otherwise, no indebtedness exists and appellees are not liable to garnishment.

The judgment of the Circuit Court is affirmed.

**North Chicago St. R. R. Co. v. Mary E. Irwin,
Executrix, etc.**

1. **NEGLIGENCE**—*Street Car Companies Running North-Bound Cars upon South-Bound Tracks.*—An instruction by which the jury are told that they may find a street car company, running a car northwardly on a track generally used for south-bound traffic, guilty of negligence, is erroneous.

Trespass on the Case.—Death from negligent act. Trial in the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded. Opinion filed April 11, 1899.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

GEORGE A. DUPUY and CLARENCE S. DARROW, attorneys for appellee.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

This is an action to recover for personal injuries, resulting in the death of Frank W. Irwin, alleged to have been caused by the negligence of the appellant.

The deceased was riding home from business on his bicycle at a late hour, about half after eleven o'clock, at night, upon North Clark street, Chicago. The testimony tends to show that he was struck by an electric car, which was at the time proceeding northward upon the west of the

two tracks of the defendant company, instead of upon the east track ordinarily used by north-bound cars. The motor-man states that when he first saw the deceased, the latter was about twenty-five or thirty feet in front of the car, and was riding between the tracks; that he at once shut off the current, but the deceased turned his wheel apparently away from the approaching car, and thereupon he released the brake and allowed the car to go ahead; and that when the car was within twelve or fifteen feet, and the deceased "switched his bicycle in a triangular way in front of the car," and was run over before the car could be stopped. It is contended by appellee's counsel that the deceased supposed the north-bound car, which was coming behind him, to be running in the usual manner upon the east track, and that he turned out upon the west track to get out of its way, entirely ignorant of the fact that it was not upon the right track, and that he was, in thus turning to the left, getting in front of the car he was intending to avoid; that in so doing, the deceased was in the exercise of ordinary care for his own safety, and that it was the negligence of the defendant company in running at what was, under the circumstances, a dangerous rate of speed upon the left-hand track, which caused the fatal accident.

There is evidence tending to support this contention, and we could not say that the verdict and judgment are contrary to the evidence, if the jury had been accurately instructed as to the law. At the request of appellee's counsel, the court gave the following instruction :

"1. The court instructs the jury that they are the sole judges as to what facts are proven by the evidence in the case, and as to whose fault it was that Frank W. Irwin was injured, if they find from the evidence that he was injured. They are further instructed, that if they find from the evidence that said Irwin was in the exercise of ordinary care for his personal safety at and prior to the time of the injury, and if they further find that the North Chicago Street Railroad Company was guilty of negligence which caused the injury, either in running a car northwardly on a track generally used for south-bound traffic (if they find track was so used, and that said car was so run), or in running said car at a rate of speed which was high and unsafe,

considering that said car was on the track usually devoted to south-bound traffic (if the jury find it to have been on said track), or if they find that such injury was caused by said car having been driven in a careless and reckless manner (if they find it to have been so driven), then, the jury should find the issues for the plaintiff, and assess her damages at such amount as they find from the evidence would be a just compensation for the pecuniary loss sustained by the next of kin of said deceased; not, however, exceeding the sum of five thousand dollars (\$5,000), if they find that said injuries resulted in the death of said Irwin. But whether running the car on the south-bound track, or the speed, or the manner of driving the car was or were negligence, is a question for the jury only, upon which the court intimates no opinion."

This instruction is clearly open to the objection urged against it by appellant's counsel. By it the jury were authorized to find the appellant company guilty of negligence "in running a car northwardly on a track generally used for south-bound trains." To so run a car is not negligence in itself, independent of the other circumstances and conditions. We can not say that this instruction was not prejudicial. It seems to express the theory upon which the case was presented to the jury, inasmuch as the court refused an instruction requested by appellant's counsel, "that the act of the defendant in running its car on the west track in a northerly direction is, of itself and alone, not sufficient to charge the defendant with negligence."

We can not agree with appellee's counsel, that the error was cured by the last clause of the instruction in question, which told the jury that whether running the car on the south-bound track was negligence, "is a question for the jury only." "It is not the mere matter of moving on the left track that constitutes negligence," say appellee's counsel in their brief, "but it is the fact coupled with the other facts appearing in this record that constituted the negligence of which complaint is here made." The instruction directly contradicts the theory thus stated, and is erroneous.

There is no allegation in the declaration of defective

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machinery. If it is claimed that the appellant was negligent in that respect, the declaration should so state. Otherwise testimony intended to sustain such charge is not competent.

The judgment of the Superior Court must be reversed and the cause remanded.

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1. **BILL OF EXCEPTIONS—*Insufficient Certificate.***—A bill of exceptions which concludes its statement of the evidence as follows: "Which, with documentary proof referred to and to be inserted, was all the testimony offered on the trial in said cause by either of said parties," is not sufficient to show that it contains all the evidence.

2. **SAME—*Identification of Exhibits.***—If exhibits are so identified by the bill of exceptions as to show conclusively that they are the ones submitted to the trial court, they become properly a part of such bill.

Assumpsit, to recover compensation, under a verbal agreement. Trial in the Superior Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed April 11, 1899.

WILLIAM M. JONES and W. MORRIS JONES, attorneys for appellant.

BULKLEY, GRAY & MORE, attorneys for appellee.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

Appellee sued in assumpsit to recover compensation to which it claims to be entitled under a verbal agreement, by which it was to receive forty per cent of the amount which should be collected from the Chicago & Northwestern Railroad Company upon a claim in favor of appellant. After the arrangement was made, and after, as it is claimed, appellee had done some work in preparing the case for presentation, appellant took the matter out of ap-

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pellee's hands, and employed counsel for itself, by whom the claim was settled or collected.

It is claimed by appellant that the original agreement with appellee was based upon an understanding that the latter should employ certain attorneys, who were not employed.

The testimony is conflicting, and was submitted to a jury, who found a verdict in favor of appellee. It is urged that this verdict is not supported by the evidence, and that therefore the judgment should be set aside.

The bill of exceptions concludes its statement of the evidence as follows: "Which, with documentary proof referred to and to be inserted, was all the testimony offered on the trial in said cause by either of said parties."

Afterward two exhibits were supplied by the court and made part of the bill of exceptions by a subsequent certificate. But it is stated by counsel for appellant that "counsel for appellee declined to furnish or permit copies of these exhibits to be made for the purpose of incorporating them in the bill of exceptions," and it appears that but two out of eight exhibits offered in evidence and read to the jury are now found therein.

It is urged upon our attention that these missing exhibits are in the control of appellee's counsel, and that "at the time the bill of exceptions was signed by the trial court it was agreed and so ordered by the trial court that these exhibits should be subsequently inserted," and that appellee's counsel "refused to furnish copies or to permit us to take copies of them." Nothing, however, appears in the record with reference to any such agreement or refusal. If appellant's counsel disobeyed an order of the trial court, that court had ways and means at its disposal to enforce compliance with its order. No effort seems to have been made by appellant's counsel to secure the aid of the court in procuring the missing exhibits.

If exhibits are so identified by the bill of exceptions as to show conclusively that they are the ones submitted to the trial court, they become properly a part of such bill. *Hughes v. Bell*, 157 Ill. 655.

Evans v. Gould.

In this case they are not even identified by the bill of exceptions. They are apparently "referred to" as "documentary proof," and are "to be inserted." But there is nothing which would identify such documentary proof, even if subsequently supplied. That a bill of exceptions must purport to contain all the evidence to enable the merits of the case to be considered in this court, is too well known to require citation of authorities; but among cases so holding are *James v. Dexter*, 113 Ill. 654, and *Lagow v. Robeson*, 167 Ill. 615.

If there was any evidence in the record showing an effort to prevent the consideration of the case on its merits by counsel, it would be our duty to give it careful consideration, and to prevent, if we could, any advantage obtained by dishonorable means. But there is no such evidence before us.

As all the evidence produced at the trial is not before us, we must presume that the judgment was justified by such evidence, even if we felt at liberty to interfere with the verdict of the jury, upon evidence which the incomplete record before us shows was conflicting.

The judgment of the Circuit Court must be affirmed.

R. O. Evans v. Charles A. Gould.

1. *APPELLATE COURT PRACTICE—Abstract Must Show Special Pleas.*—The Appellate Court may fairly be presumed to have knowledge of what the common counts in *assumpsit* contain, but not what a special count upon an express contract contains. Such counts must be shown by the abstract.

2. *SAME—Defects in the Abstract Cured by Appellee.*—Where the appellee, by an additional abstract filed by him for the purpose of obtaining a review of the judgment upon cross-errors, has supplied enough to enable the court to consider the case upon its merits, the defects in the abstract are cured.

Assumpsit, on a contract of hiring. Trial in the County Court of Cook County; the Hon. ALBERT O. MARSHALL, Judge, presiding. Find-

ing and judgment for plaintiff; appeal by defendants. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed April 11, 1899.

FRANK LITTLE, attorney for appellant.

F. P. BLACKMAN and JOHN R. DAY, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

According to appellant's abstract of the record, the declaration consisted of the common counts and one or more special counts upon an express contract, but nothing is shown of the contents of the special counts or either of them. We might fairly be presumed to have knowledge of what the common counts in an assumpsit suit contain, but not so concerning a special count upon an express contract.

Another serious defect in appellant's abstract, is the omission to include in it any mention of his assigned errors, which constitute his pleading in a court of review, and upon which he must rely if he hopes for a reversal of the judgment against him. The only statement of them is, "Assignment of errors on behalf of appellant."

The appellee made the point of the insufficiency of the abstract, and invoked its application against appellant, in a brief filed ten months ago, but no step has been taken to correct or amend the same.

Under such circumstances the proper course is to affirm the judgment.

Some of the cases in point are: Superior Lumber Co. v. Tracy, 78 Ill. App. 551; Richey v. Dunham, 50 Ill. App. 246; Heidenbluth v. Rudolph, 50 Ill. App. 242, in which cases reference to many others may be found.

But the appellee (plaintiff below), by an additional abstract filed by him for the purpose of obtaining a review of the judgment upon cross-errors, has supplied enough to enable us to consider the case upon its merits. The insistence under the cross-errors is that the court erred in not giving plaintiff judgment for more, in that it did not award him a full year's salary of six hundred dollars, and expenses paid by him in the course of his employment.

And it is urged that upon the authority of *Linder v. Monroe*, 33 Ill. 388, this court may give final judgment here for the correct amount, the evidence being free from conflict in respect of the expenses paid by appellee. Whether that authority is in point and applicable to a case like this, may be doubted. But we regard the merits of the controversy as settled by the judgment that was given. The contract between the parties that was introduced in evidence, was one of hiring of appellee by appellant upon a stipulated compensation, to canvass for and sell certain school supplies made by appellant.

The question of what appellee was entitled to, if anything, was fairly before the court, upon the contract which was read in evidence and the testimony of appellee, comprising all the evidence heard or offered, and we are unable to discover any error in the result arrived at by the court, either upon the law or the facts.

We think the court's actions in holding and refusing the several propositions of law that were submitted by both sides, were correct, but we do not regard the questions involved there as novel, or of sufficient importance to be elaborated, when to elaborate would be to merely restate common knowledge by the profession concerning contracts of employment, and whether severable or entire under the particular provisions of each.

We have read all the evidence with care, and have considered every proposition of law that was submitted to the court, either held or refused, and our conclusion is that in law no error was committed, and upon the merits that substantial justice has been done. Affirmed.

Charles G. Wheeler v. Nathaniel C. Foster.

1. EQUITY PLEADING—*Allegations—Proof and Decree Must Correspond.*—A decree can not give relief which facts disclosed by the evidence would warrant, unless there are averments in the bill to which the evidence can be applied.

2. SAME—*Forfeiture for Non-payment of Interest, Taxes, etc.*—In

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a bill to foreclose a trust deed for the whole amount secured by it, because of a default in the payment of an installment of interest, the principal note not having by its terms matured, an allegation should be made that the holder of such note, or some one for him, had exercised the option conferred upon him by the trust deed and declared the principal sum to be due.

Foreclosure of Trust Deed.—Trial in the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Hearing and decree for complainant; appeal by defendant. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded with directions. Opinion filed April 11, 1899.

WHITEHEAD & STOKER, attorneys for appellant, contended that where there is no allegation in the bill under which any evidence is admissible, showing that the holder of the note had declared the whole amount of the principal note due, a decree directing the appellant to pay the same within the time limited, or that the premises be sold, is not supported by any allegation in the bill, and is erroneous.

Care should be taken in framing the bill that everything which is intended to be proved be stated upon the face of it; otherwise evidence can not be admitted to prove it. 1 Barbour Ch. Pr. (Sec. Ed.), 40, citing *Gordon v. Gordon*, 3 Swans. 472; *Hall v. Maltby*, 6 Price, 240; 18 Ves. 302; 6 Sim. 565.

A bill wholly insufficient to authorize the relief sought is never aided by proof. If the allegation of a bill that shows a want of equity is proved, the proof shows no more equity than the bill; and if the proof goes beyond such bill as establishes ground for relief, the relief can not be granted, because the allegations and proofs do not correspond. *Chicago P. S. Ex. v. McClaughry*, 148 Ill. 382.

It is a fundamental rule in equity that the allegations of the bill, the proof and the decree must correspond, and the decree can not give relief that facts disclosed by the evidence would warrant, when there are no averments in the bill to which the evidence can apply, and that if the evidence disproves the case made by the bill the complainant can not be given a decree upon the grounds disclosed by the proof, unless the court permits the complainant to amend

the bill so as to prevent the case described by the evidence. Dorn v. Gender, 49 N. E. Rep. 492.

SMITH, HELMER, MOULTON & PRICE, attorneys for appellee, contended that where a trust deed provides that on non-payment of any installment of interest or non-payment of taxes, etc., the whole debt may, at the option of the holder of the notes, become due and a foreclosure be had, a formal declaration of an election to declare the principal note due is unnecessary, and a suit brought or sale made upon such default is, *per se*, such an election and the exercise of the option need not be averred.

The mortgagee's proceeding to enforce the mortgage sufficiently shows his election. Jones on Mortgages, Vol. 2, Sec. 1182; Harper v. Ely, 56 Ill. 179; Princeton Loan & Trust Co. v. Munson, 60 Ill. 371; Cundiff v. Brokaw, 7 Ill. App. 147.

When by the terms of a mortgage it has become due by default in the payment of interest before suit is commenced, it is not necessary that the bill should formally allege that the principal is due. An allegation that no principal or interest has been paid is sufficient. Beach's Modern Eq. Pr., Sec. 133; Bodine v. Gray, 24 N. J. Eq. 335.

Where a mortgage contained a condition that upon the failure for ninety days to pay the interest, the principal should become due, provided such failure was not caused by the fault of a third party, it was deemed sufficient to allege the default in payment of interest. If there was any fault of a third party, it was a matter of defense to be made out by the defendant. Water Works Co. v. Barret, 103 U. S. 516.

The bill sets out the mortgage as a part thereof, and alleges that under its provisions the taxes were to be paid by the defendants and their default in that regard. This, we think, was sufficient under the general prayer for relief to authorize the entry of a decree for the taxes to be paid by the mortgagees *pendente lite* to protect the title to the property mortgaged. Brown v. Miner, 128 Ill. 157.

If the bill had contained an allegation of the amount of

the tax lien, and that the same had been paid by complainant, it would not be subject to criticism; but the allegation in connection with the terms of the trust deed which is a part of the bill is, in our judgment, sufficient upon which to predicate the evidence of the payment of the \$1,000 item embraced in the decree. *Cheltenham Improvement Co. v. Whitehead*, 128 Ill. 284.

MR. JUSTICE SHEPARD delivered the opinion of the court.

A question of pleading, only, is raised by this record. The bill was to foreclose a trust deed for the whole amount secured by it, the principal note not having by its terms matured, because of default in the payment of an installment of interest and certain taxes.

Concerning the right so to do, it was alleged that the trust deed provided that if default were made, and continued for thirty days, in the payment of any installment of interest, then the whole of the principal sum by said trust deed secured "should at once, at the option of the holder or holders of said principal promissory note, become due and payable without notice," etc., "and that thereupon the legal holder of said principal note, or said trustee for the benefit of such holder, should have the right to immediately foreclose said trust deed," etc.

And it was alleged that default was made in the payment of the interest due on the last preceding installment day, and in the payment of certain taxes.

The bill contained no allegation that the holder of the principal note, or anybody for him, had declared the principal sum to be due, or in any manner exercised the option conferred upon him by the trust deed.

Assuming, for present purposes, that it was sufficiently proved that the holder of the note did declare the whole of the principal due, does making such proof cure the defect in not averring the fact? Certainly not. "Nothing is better settled than that proofs without allegations are just as unavailing as allegations without proof." *Bremer v. Canal & Dock Co.*, 123 Ill. 104; *Detroit Stove Works v. Koch*, 30 Ill. App. 328.

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"It is a fundamental rule of equity pleading, that the allegations of a bill, the proof and the decree must correspond, and that the decree can not give relief that facts disclosed by the evidence would warrant, where there are no averments in the bill to which the evidence can apply." *Dorn v. Geuder*, 171 Ill. 362; *Chicago Public Stock Exchange v. McClaughry*, 148 Ill. 372.

Appellee argues that bringing the suit was of itself an election by appellee, the holder of the note, to declare the principal sum due. That may be so, but the question is not one of fact or of substantive law. It is not whether in fact the principal was due or not at the filing of the bill. The question is merely what was averred in that respect. We decide only a rule of pleading, that a party can not aid his pleadings by his proofs, or, in other words, can not make a better case by his proofs than he has alleged in his bill.

The decree of the Circuit Court is reversed and the cause remanded, with directions to that court to permit appellee to amend his bill and make additional proof, if he shall be so advised and desire.

Reversed and remanded with directions.

Carl F. Julin v. Anna Bauer, Peter Van Vlissingen et al.

1. *CONTRACTS—Of Extension—Essentials.*—In order that both parties should be bound by a contract of extension it is essential that some consideration should appear. Unless the debtor is bound to retain the money for a given time, and to pay the interest for that time, whether he retains the money for the time or not, such contract lacks consideration, and is not binding upon either party.

2. *SAME—Void Under the Statute of Frauds.*—To render a parol contract void under the statute of frauds, it must be the apparent understanding of the parties that it was not to be performed within a year from the time it was made.

Foreclosure of Trust Deed.—Trial in the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Decree for complainants; appeal by defendants. Heard in the Branch Appellate Court at

the March term, 1899. Reversed and remanded. Opinion filed April 11, 1899.

FRED H. ATWOOD and FRANK B. PEASE, attorneys for appellant.

A verbal agreement to extend the time of payment is binding and suspends the right to foreclose. 2 Jones on Mortgages, Secs. 1190 and 1191; Goodall v. Boardman, 53 Vt. 92; Loomis v. Donovan, 17 Ind. 198; Tompkins v. Tompkins, 21 N. J. Eq. 338.

Where a written proposition is made, a verbal acceptance is sufficient. Farwell v. Lowther, 18 Ill. 252; Esmay v. Gorton, 18 Ill. 483; Perkins v. Hadsell, 50 Ill. 220; Sanborn v. Flagler, 9 Allen (Mass.), 474; 8 Am. and Eng. Enc. of Law, 711, and cases cited; Argus Co. v. Mayor of Albany, 55 N. Y. 495; Thayer v. Luce & Fuller, 22 Ohio St. 62.

WILLIAM W. CASE, attorney for appellees.

An agreement to postpone the maturity of a promissory note is without consideration and invalid unless the person liable upon the note binds himself by a valid counterpromise to keep the principal and pay the interest during the extension period. Waters v. Simpson, 2 Gilm. 570; Woodford v. Dow, 34 Ill. 424; Glickauf v. Hirschhorn, 73 Ill. 574; Stuber v. Schack, 83 Ill. 191; Crossman v. Wohleben, 90 Ill. 537.

If there was a verbal agreement to extend the time of payment for five years, and this agreement was within the statute of frauds, it was no more available as a defense than as an affirmative cause of action. McGinnis v. Fernandes, 126 Ill. 228; Wheeler v. Frankenthal, 78 Ill. 124; Browne on the Statute of Frauds, Sec. 131.

An agreement to extend the time of payment of a note is an agreement of forbearance, and if the extension is for more than one year the agreement is void unless in writing. Mills v. Todd, 83 Ind. 25; Ralph v. Baxter, 66 Ill. 416.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

The bill in this case seeks to foreclose a trust deed for

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non-payment of one of two notes thereby secured, each for the sum of six thousand dollars. The first note became due in 1893, and by agreement of the parties was extended five years. The second became due September 1, 1896. Appellant undertook to procure its extension at a reduced rate of interest, and claims that Van Vlissingen, one of the appellees, as agent for the holder of the note, agreed with him to extend it five years from the date of its maturity. This is denied by complainants, and the principal controversy is whether or not a valid agreement for extension was made.

The interest had been fully paid, and there has been no default except as to payment at maturity of the note, which is claimed to have been extended. The bill seeks to foreclose to compel payment of the one note only, leaving the other to mature according to its terms.

Appellees deny that any extension agreement was made, but say that if there was any, such agreement was not in writing, as they insist is required by the statute of frauds. The master, while expressing the opinion that appellant was led to and did believe that he had secured such extension, concludes that no such valid agreement in writing was made as in his opinion the statute requires.

The evidence tends to show that appellant signed, August 4, 1896, an application in writing to Van Vlissingen, for a six thousand dollar loan, to run from September 1, 1896, in which application he authorized the said agent to negotiate the loan at five and a half per cent interest, and agreed to pay one and one-fourth per cent commission. It is stated in the application that the proposed loan is applied for to pay off the note now in controversy. This was treated by both appellant and Van Vlissingen as an application for an extension, not for a new loan. In a letter to appellant dated August 12, 1896, the agent says:

“With reference to your application for loan of \$6,000 at five and one-half per cent, * * * I find the party unwilling to extend the loan at five and one-half per cent. I think the best arrangement I can make for you is six per cent and one and one-fourth per cent commission.” Appellant's testimony is that he thereupon agreed to pay the six

per cent and the one and one-quarter per cent commission, although he says the agent had previously agreed to extend upon the terms of the application of August 4th, in proof of which he produces the agent's business card, on the back of which Van Vlissingen had written: "Carl F. Julin, five and one-half per cent interest, and one and one-fourth per cent commission, and twenty-five dollars for drawing papers."

The agent's version is that Julin at all times refused to pay more than five and one half per cent interest.

August 22d, thereafter, Van Vlissingen wrote Julin that the holder of the note had informed him she was in need of the money and had requested him to collect it at maturity. This is admitted to have been untrue. Appellee Bauer, the holder of the note, was, as she testifies, entirely willing to extend it at six per cent.

Subsequently, in October, when the note in controversy had, according to its terms, matured, Van Vlissingen sent a clerk to Julin with a demand that he sign a new application for the money at the rate of six per cent interest and two and one-half per cent commission. Appellant claims that his refusal to pay this extra commission is the reason for this suit.

The written memoranda signed by Van Vlissingen are not sufficient to evidence an agreement between him and appellant for an extension. The verbal testimony is conflicting, and the evidence upon the whole fails to establish such an agreement.

It is urged, however, that the appellee, Anna Bauer, the holder of the note, is estopped from maintaining this suit.

The bill was filed November 2, 1896. When the case came up before the master, appellant claims to have been able to learn, for the first time, the address of Mrs. Bauer, who, as the holder of his note, is the real party in interest. He called upon her, and told her his version of the negotiations with Van Vlissingen, to the effect that he had accepted the proposition to pay the six per cent interest and one and one-fourth per cent commission for a five years' extension. She had been previously informed of the agent's

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version, namely, that appellant refused to pay more than five and one-half per cent interest, and that therefore the foreclosure proceeding had been begun. Mrs. Bauer then, as the master finds, made a verbal agreement with appellant to take the business out of Van Vlissingen's hands, and to have papers drawn extending the note five years at six per cent. Appellant testifies that she agreed to dismiss the suit and relieve him from all business with the agent. He thereupon paid her six months' interest, due that day, March 1st, at the rate of six per cent—the note by its terms bearing interest at the rate of seven per cent after its maturity—and received her receipt therefor. This interest payment was subsequently, under advice of appellees' counsel, tendered back to appellant, who refused it.

The master finds, in substance, that the evidence discloses an agreement by appellant with Mrs. Bauer to retain the money for the period of five years from the maturity of the note, and to pay interest upon it for that time at six per cent, in consideration of which Mrs. Bauer agreed to have papers drawn extending the note five years; and such was clearly the real intention and understanding of the parties.

It is essential that both parties shall be bound by the contract of extension; some consideration must appear; "Unless the debtor is also bound by the contract to retain the money for a given length of time, and to pay the interest for that period whether he retains the money that length of time or not, such promise by the creditor lacks consideration, and is not binding upon either party." *Crossman v. Wohlleben*, 90 Ill. 537. 542.

These conditions seem to have been met by the agreement in question.

The master, while expressing doubt whether she ought not to be held estopped from further prosecution of this suit, finds, that as the agreement then made was not in writing, it was not binding upon appellee under the statute of frauds, apparently because of the want of direct evidence that it was by its terms to be performed within a year.

There is nothing in the agreement—the terms and making of which are not disputed by Mrs. Bauer—to show that it was not to be so performed. On the contrary, the strong implication is that it was the intention of the parties that it should be performed without delay. Indeed, the performance seems to have begun at once by the payment of the interest then due at the rate of six per cent and the acceptance of it by appellee Bauer, although by the terms of the original note she was then entitled to claim seven per cent, it having already matured. In *McPherson v. Cox*, 96 U. S. 404, 416, it is said: “The statute of frauds applies only to contracts which by their terms are not to be performed within a year, and does not apply because they may not be performed within that time. In other words, to make a parol contract void, it must be apparent that it was the understanding of the parties that it was not to be performed within a year from the time it was made,” referring to *Peter v. Compton*, Skin. 353, decided in King’s Bench by Lord Holt, and the cases collected under it in 1 Sm. L. C. 432. Again in *Walker v. Johnson*, 96 U. S. 424, 427, the same doctrine is reaffirmed. “In order to bring a parol contract within the statute, it must appear affirmatively that the contract was not to be performed within the year.”

In *Birks v. Gillett*, 13 Ill. App. 369, 375, it is said that the contract was not void because it was not to be performed within a year from the making of it, “for the reason that the contingency which might have put an end to it, might have happened within one year from that time.” It is evident that the agreement to dismiss the suit and to have papers drawn extending payment for five years could have been, and if carried out in good faith would have been, executed within less than a year.

For the reasons stated we are of opinion that the application for leave to amend the answer setting up the agreement with Mrs. Bauer should have been allowed.

The suit is prosecuted under an agreement between Mrs. Bauer and her agent, in which he promises and guarantees to her that she shall be at no cost or expense whatever for

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attorney's fees or otherwise. It is urged that this is maintenance, and in violation of the criminal statute in relation thereto. Of the gross impropriety of such an agreement, if made for the purpose of inducing her to allow a suit to be prosecuted in her name for another's benefit, there can be no question. Further than this, consideration of the agreement in question is not now necessary; and we do not undertake to determine its effect, if any, upon the rights of the parties.

The decree of the Circuit Court is reversed, and the cause remanded.

James L. Board v. Marie O'Donovan.

1. *AFFIDAVIT—For Continuance—To be Taken Most Strongly Against the Mover.*—All intendments are to be taken against an affidavit for a continuance, and it can not be assumed that a witness would testify to anything more than the affidavit states.

2. *PRESUMPTIONS—As to When Indorsements Are Made.*—In the absence of evidence tending to show when indorsements on a note by a third party were made, the presumption is that they were made simultaneously with the execution of the note, and for a consideration.

Assumpsit, on a guaranty. Trial in the Superior Court of Cook County: the Hon. PHILIP STEIN, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed April 11, 1899.

JOSIAH CRATTY and OSCAR P. BONNEY, attorneys for appellant.

The note and the guaranty are distinct contracts. *Abbott v. Brown*, 131 Ill. 108; *Columbian Hardwood Lumber Co. v. Langley*, 51 Ill. App. 100.

The signature of a third party on the back of a note in the hands of the payee, is presumptive evidence that it was placed there as a guarantee at the time of the execution of the note. *Kankakee Coal Company v. Crane Bros.*, 138 Ill. 207.

It was therefore material that appellant should show to the contrary, and the facts and circumstances shown by the affidavit for continuance would have tended to prove appellant's contention under his special plea in that regard. Where a note is indorsed in blank by a third person before delivery, the contract of the indorser is presumed to be that of a guarantor, not that of a joint promisor or surety. *DeWitt Co. National Bank v. Nixon*, 125 Ill. 615; *Kingsland v. Koeppe*, 137 Ill. 344; *Ryan v. First Nat. Bank*, 148 Ill. 349.

Where a guarantor signs before or at the time of delivery he is legally presumed to adopt the consideration of the note as the consideration for his undertaking, and no independent consideration is necessary. *Carroll v. Weld*, 13 Ill. 682; *Klein v. Currier*, 14 Ill. 237; *Rich v. Hathaway*, 18 Ill. 548; *Parkhurst v. Vail*, 73 Ill. 343.

CLARK & CLARK, attorneys for appellee.

An affidavit for a continuance is like a pleading; it is to be construed, when equivocal or uncertain, most strongly against him who offers it. *Slate v. Eisenmeyer*, 94 Ill. 96; *Dacey v. People*, 116 Ill. 555; *Evans v. Marden*, 54 Ill. App. 291.

Where the testimony of the witness will be material only in connection with certain facts, these facts should appear from the affidavit, so that the materiality of the testimony may be apparent to the court. *Bailey v. Hardy*, 12 Ill. 459; *Updike v. Henry*, 14 Ill. 379.

An affidavit for a continuance must show that the witness was not absent by the procurement or consent of the party applying for the continuance. *Crews v. The People*, 120 Ill. 317.

It must show the place of residence of the witness, so that the court can determine the diligence of the party in securing his attendance or obtaining his deposition, and also determine whether there will be any probability of the attendance of the witness, if the case is continued, or of securing his deposition.

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The affidavit for a continuance of this cause was insufficient. It does not state the residence of the witness, neither positively nor by any fair inference. This is indispensable as connected with his identification and diligence in obtaining his attendance. *Lee v. Quirk*, 20 Ill. 392; *Trask v. People*, 151 Ill. 527.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

Appellant is sued as guarantor of a promissory note. A motion for continuance was made, supported by affidavit, which set forth as one of his defenses that he placed his name on said note without any good or valuable consideration therefor; that one Ludwig, a material witness, was absent on account of sickness; that if present said witness would testify that the payee of the note at the time of the making of the loan stated that he was satisfied with the note, and did not desire any indorsement thereon or other security; that the signature of appellant was not placed on the note at the request of the payee; that the money for which the note was given was advanced and delivered to the maker "a day or longer before said Board placed his name upon the note given for said loan."

We are told that the court erred in overruling the motion for a continuance, based on the affidavit.

It is conceded by appellant's counsel that where a stranger indorses a note in blank, in the absence of an agreement or understanding to the contrary between the parties, the law raises an implied promise of guaranty. But the plea, it is said, sets up an agreement which negatives such implied promise, and the testimony of the absent witness would have tended to establish such agreement.

The plea states that the consideration for the note was money loaned by the payee to the Lake Shore Foundry Co., the maker, which was received by said maker before the note was given, with an agreement that the payee would take the note without the indorsement of appellant, and that appellant afterward indorsed the note without consideration.

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The testimony of the absent witness, if in accord with the affidavit for continuance, would not have tended to sustain the material averments of the plea, namely, an agreement by the payee to accept the note without indorsement, that the indorsement was without consideration, and that it was placed upon the back of the note at a time subsequent to the execution. It is said the witness would testify that the money was "loaned, advanced and delivered * * * a day or longer before said Board placed his name upon the note." That may very well be, and yet the execution of the note by the maker and the indorsement by appellant have occurred as parts of one and the same transaction. The plea states that the money was received by the foundry company before the note itself was given.

The affidavit was not sufficient. All intendments must be taken against the affidavit, and it can not be assumed that the witness would testify to anything more than the affidavit states. *Evans v. Marden*, 54 Ill. App. 291-294; *Slate v. Eisenmeyer*, 94 Ill. 96-101.

In the absence of evidence tending to show when the indorsement by a third party was made, the presumption is that it was simultaneous with the execution and delivery of the note and for a consideration. *Grier v. Cable*, 45 Ill. App. 405; *Kankakee Coal Co. v. Crane Bros. Mfg. Co.*, 138 Ill. 207, 208; *Joslyn v. Collinson*, 26 Ill. 62, 73 Ill. 343 and many other cases.

The judgment of the Superior Court is affirmed.

**Minna Allmendinger, Impleaded with Jacob Blattan, v.
Malcom McDonald Lumber Co.**

1. *CONSIDERATION—Waiver of Lien as, Sufficient.*—An agreement to waive security to be acquired by a mechanic's lien upon the property of the party making the agreement is, in law, under the facts and circumstances of this case, a good and sufficient consideration for a promise to pay the debt.

Allmendinger v. Malcom McDonald Lumber Co.

Assumpsit, for merchandise sold, etc. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendants. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed April 11, 1899.

BARKER & CHURCH, attorneys for appellant.

E. L. BARBER, attorney for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

In December, 1890, Jacob Blattau, a son-in-law of appellant, Minna Allmendinger, made a contract with her by which he agreed to do the carpenter work and furnish the material for certain buildings to be erected for her in this city. Blattau procured from appellee lumber for, and which was used in the construction of, said buildings, which were completed about the middle of April, 1891. Appellee claims that in the spring of 1891, appellant promised to pay to appellee the balance due for such lumber, amounting to \$704.06, if appellee would extend the time for payment, and not put a lien upon her buildings, and that appellee agreed to such arrangement. Also that, relying upon such agreement, it did not put a lien upon the buildings.

On the part of appellant it is claimed that she did not promise to pay appellee as contended, and that in any event the judgment is too large.

In argument it is contended, on behalf of appellant, that even if appellant did promise and agree to pay the balance due to appellee, that such promise was without consideration, and therefore void. We think not. Parties representing appellee were pressing for payment of its claim. Appellant was by them requested to pay it. The time for placing a lien upon her property had not then expired. Appellant might also have been made personally and jointly liable with Blattau under the Mechanic's Lien Statute. An agreement by appellee to extend the time of payment and to waive whatever security it might acquire by a lien upon the property of appellant, was in law, under the facts and

circumstances of this case, good and sufficient consideration for the promise of appellant.

The most that can be successfully contended as to the testimony concerning the material questions involved, is that it is conflicting. It can not be said that the verdict of the jury is so manifestly contrary to the evidence as to justify the court in setting it aside. The questions of fact as to whether appellant promised to pay the balance due to appellee, and as to what amount was so due, were fairly submitted to the jury, and their finding is controlling.

The judgment of the Superior Court is affirmed.

Chicago General Ry. Co. and West and South Towns St. Ry. Co. v. Joseph Capek, for the Use of Leo Roeder.

1. **JUDGMENTS**—*For the Use of an Assignee in Action for Personal Injuries.*—Judgment erroneous because it awards damages for the use of an assignee of a cause of action for personal injuries.

2. **PERSONAL INJURIES**—*Claim for, Not Assignable.*—Causes of action for injuries to property, real or personal, by which an estate is diminished, are generally assignable, but on grounds of public policy the assignment of actions for injuries to the person are not.

3. **SAME**—*Actions in the Name of the Assignee.*—The fact that a suit is brought by and in the name of the assignee, and not in the name of the party injured for the use of the assignee, does not change the legal status of the plaintiff.

4. **CONTRACTS**—*Preventing a Litigant from Settling His Suit, Void.*—A contract by which a client is prevented from settling or discontinuing his suit is void, as tending to foster and encourage litigation.

5. **PRACTICE**—*Suits for the Use of, etc.*—*Rights of the Nominal Plaintiff.*—Where a suit is in the name of one person for the use of another, the nominal plaintiff can not control it. He can not dismiss it without the consent, or against the objection of the usee, and the defendant can not settle with or buy his peace from the nominal plaintiff or pay the judgment to him.

6. **PARTIES**—*Rights of the Usee.*—Where a suit is in the name of one person for the use of another, the usee is the party to whom any judgment recovered therein must be paid; he alone can prosecute a suit on such judgment even against the wishes of the nominal plaintiff, and if the defendant pays the same to such plaintiff it will not protect him, or be a bar to a suit upon an appeal bond for the use of the real plaintiff.

7. **EVIDENCE**—*Condition of Appliances.*—In an action for personal

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injuries resulting from a railroad accident, it is competent to show that a brass handle, running horizontally along the end of the car where the person injured was standing, to the corner of the car, then turning downward and running vertically along the corner of the car, was off of the car at the time of the injury.

Action for Personal Injuries.—Trial in the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded. Opinion filed April 11, 1899.

Statement.—The judgment in this case is recovered in the name of Joseph Capek, for the use of Leo Roeder, upon an alleged cause of action for personal injuries received by said Capek. April 29, 1894, Capek got upon one of the cars of the Chicago General Railway Company at Blue Island avenue and Twenty-second street, in the city of Chicago. He took his position upon the front platform of the car at the south side of the front door, and rode in that position from Blue Island avenue west to Turner avenue, a distance of about two and one-half miles. When within about half a block of Turner avenue, he indicated to the motorman his desire to get off the car at Turner avenue. The motorman stopped the car at the east side of Turner avenue, with the front platform at the east crossing. The car stopped there for the space of about a minute. Capek decided to get off at that place, and, just as he was in the act of alighting, the car started with a jerk, and Capek reached for the handle on the body of the car extending from the corner of the car to the door, missed it, and fell forward in front of the car, and the car passed over his right arm, stopping about the middle of Turner avenue. It was contended by plaintiff that there was no horizontal handle on the body of the car from the door to the corner of the car; that it had been broken off in a collision some time prior to the Capek accident, and that the reason of Capek's falling from the step was the lack of this handle.

These are all the facts which seem to be necessary to an understanding of the opinion of the court.

GLENN E. PLUMB, attorney for appellants.

BRANDT & HOFFMANN, attorneys for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

We shall pass upon only two of the points presented in the arguments in this case, viz.:

1st. Is the judgment erroneous because it awards damages for the use of an assignee of a cause of action for personal injuries?

2d. Did the trial court err in excluding testimony offered tending to show that the handle in question was not broken off the car at the time Capek was injured?

First: The declaration is "Joseph Capek, who sues for the use of Leo Roeder, complains," etc. The judgment order is, "Joseph Capek, for the use of Leo Roeder." The appeal bond runs to "Joseph Capek for the use of Leo Roeder."

Upon the trial appellants sought to show by appellee, when he was on the witness stand, who Leo Roeder is, and whether appellee had assigned his claim against appellants to him. They were not permitted to make such proof.

If from the fact that the pleadings, record and appeal bond all show that the suit is for the use of Leo Roeder, it be assumed that the claim of Capek had been assigned by him to Roeder, than the exclusion by the court of the proof offered as to that was correct. If it be not thus assumed, then it was error to exclude such proof.

In *N. Chi. St. R. R. Co. v. Ackley*, 171 Ill. 100, the question as to the assignability of claims for injury to the person is very fully discussed. So, also, is the distinction between the assignability of causes of action for injuries to property and injuries to the person. A large number of cases are reviewed by the court in that case, and the conclusion is thus summarized (p. 108):

"Causes of action for injuries to property, real or personal, by which an estate is diminished, are generally assignable. On grounds of public policy the sale or assignment of actions for injuries to the person are void. The law will

not consider the injuries of a citizen, whereby he is injured in his person, to be, as a cause of action, a commodity of sale. On other grounds assignability is not legal."

The Ackley suit was brought by and in the name of the assignee, and not in the name of the party injured for the use of the assignee. Does that change the legal status? We think not. In that case the court says (p. 110):

"Any contract whereby a client is prevented from settling or discontinuing his suit is void, as such agreement would foster and encourage litigation."

Where a suit is in the name of one person for the use of another, the nominal plaintiff can not control the suit. He can not dismiss it without the consent or against the objection of the usee. The defendant can not, in such a case, settle with or buy his peace from the nominal plaintiff. Defendant could not pay a judgment to him. The appeal bond runs to the usee. He could prosecute a suit thereon even against the wishes of the nominal plaintiff. If the judgment in this suit were affirmed by this court, and appellant should pay the amount of the same to the plaintiff, that would not protect appellant, or be a bar, in a suit upon the appeal bond for the use of Roeder.

We are of opinion that this suit can not be maintained for the use of, when it could not be in the name of, an assignee of the claim in question.

Second. There are two handles referred to in the testimony. One was a brass handle, running horizontally along the end of the car where Capek was standing, to the corner of the car and then turning downward and running vertically along the corner of the car. The other was a small iron handle fastened vertically to the corner of the car. If we understand it correctly, the small iron handle took the place of the vertical part only, of the brass handle. Whether the brass handle was off the car at the time Capek was injured, was an important question. Plaintiff had offered testimony tending to show that the brass handle was off at the time, and that the small iron handle had theretofore been put upon the corner of the car.

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Appellants sought to prove that the brass handle was broken off in an accident May 17th, eighteen days after the injury to Capek; that prior to that time there had been no injury to any of the handles on that car, and that after the collision, May 17th, the iron handle was put upon the car.

There was testimony offered by appellants tending to show that the brass handle was on the car in good condition, and had not been broken off at the time Capek was injured. But it was an important and contested question. Appellants were entitled to have the proof admitted which they offered on that question, so far as it was competent and proper testimony. It could not be properly excluded on the ground that it was cumulative. To prove that the brass handle was broken off in a collision eighteen days after Capek was injured, and that it had not broken off prior to the time of that collision, is one mode, and a proper mode, of showing the condition of that handle at the time of the injury to Capek. It was error to exclude this testimony.

The judgment of the Superior Court is reversed and the cause remanded.

North Chicago Electric Ry. Co. v. Caroline Moosman, Adm'x, etc.

1. JURORS—*Disqualifications of.* Under Sec. 2, Chap. 78, R. S.—A person over sixty years of age is disqualified to serve as a juror. (Sec. 2, Chap. 78, R. S.)

2. STATUTORY RIGHTS—*Peremptory Challenges Are.*—Peremptory challenge, to the number limited, is a statutory right, and not merely a regulation. A party is entitled to exclude from the jury, in the trial of his cause, persons to the number allowed by the statute who are objectionable to him, without assigning a reason therefor. He is the sole judge of whether such persons are objectionable, and his decision of that question is final and conclusive.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in

North Chicago Electric Ry. Co. v. Moosman.

the Branch Appellate Court at the March term, 1899. Reversed and remanded. Opinion filed April 11, 1899.

ALEXANDER CLARK, attorney for appellant.

In 1874, age was made a disqualification of a juror. Secs. 2 and 14, Chap. 78, Revised Stat.; *Plummer v. People*, 74 Ill. 361.

If, on account of the refusal of a court to allow a juror to be properly challenged for cause, a party is compelled to exhaust his peremptory challenges and thereby an objectionable juror is left upon the panel, the error will be a reversible one. *Robinson v. Randall*, 82 Ill. 521; *Wilson v. People*, 94 Id. 299; *Spies et al. v. People*, 122 Id. 257.

J. R. PHILP and MUNSON T. CASE, attorneys for appellee, S. P. SHOPE, of counsel, contended that the age of a juror is an exemption, not a disqualification. *Davison v. The People*, 90 Ill. 225; *Davis v. The People*, 19 Ill. 74; *Murphy v. The People*, 37 Ill. 447; *Chase v. The People*, 40 Ill. 352.

MR. JUSTICE HORTON delivered the opinion of the court.

This is an action on the case, brought by appellee, against appellant, to recover damages for the death of appellee's intestate, claimed to have resulted from the negligence of the appellant's motorman, in running its electric street car, operated by overhead trolley, on Milwaukee avenue, at a point where that avenue is intersected by Fullerton avenue.

In selecting the jury for the trial of this case, one of the persons called to serve stated that he was between sixty-one and sixty-two years of age. The attorney for appellant moved that such juror be excused because of his age, that is, a challenge for cause was interposed, the cause being that the juror was disqualified for the reason that he was over sixty years of age. This challenge was denied by the court, to which attorney for appellant duly excepted. Attorney for appellant then challenged such juror peremptorily. He had interposed two peremptory challenges before that. Therefore if such challenge for cause was not well taken, he then exhausted the three peremptory challenges to which

he was entitled by statute. Afterward said attorney interposed separate peremptory challenges to two other jurors, each of which was denied by the court upon the theory that all of the peremptory challenges to which appellant was entitled had been exhausted. Both of said jurors, as to whom appellant's peremptory challenges had been denied, sat as jurors in the trial of said cause.

On behalf of appellant it is contended that the court erred in denying the challenge for cause of the juror who was over sixty years of age, and in refusing to allow one of the peremptory challenges thereafter interposed.

Thus the question is presented as to whether, when a person who is over sixty years of age is called to serve as a juror, the fact that he is of that age, is only a privilege or right of exemption, to be claimed by the juror himself, or whether it is also a disqualification which may be urged by a party to the suit.

Section 2, Chapter 78, R. S. of Ill., provides that the county board, in making the "jury list," shall take the names of such only as are:

"*First.* Inhabitants of the town or precinct not exempt from serving on juries.

"*Second.* Of the age of twenty-one years or upward, and under sixty years old.

"*Third.* In the possession of their natural faculties, and not infirm or decrepit.

"*Fourth.* Free from all legal exceptions, of fair character, of approved integrity, of sound judgment, well informed, and who understands the English language."

Section 14 provides that "It shall be sufficient cause of challenge of a petit juror that he lacks any one of the qualifications mentioned in section two."

The Jury Commissioners Act, in force July 1, 1897, is, in effect, only an amendment of said chapter 78, entitled "Jurors." No material change in the statute is hereby made, in so far as the question now under consideration is involved. The same age qualification is retained, but it is provided that the jury commissioners instead of the county board shall make up the jury list. It provides the jury list

shall be "a list of electors * * * possessing the necessary legal qualifications for jury duty."

The answer to the question presented is to be evolved by an interpretation of the statute as to jurors.

This statute was under consideration by the Supreme Court in *Plummer v. People*, 74 Ill. 361. After quoting from section 14 (then section 15) as to the cause of challenge, the court says (p. 365):

"The section, plainly, to our minds, specifies three totally distinct and independent causes of challenge."

"First, when the juror lacks any one of the qualifications mentioned in section two," etc.

Some of these qualifications are that the persons selected shall be "Inhabitants of the town. * * * In the possession of their natural faculties * * * and who understand the English language." Suppose a person is called into the jury box who is not in the possession of his natural faculties, *i. e.*, one who is insane. Will any one contend that this is not a disqualification, or not a sufficient ground of challenge for cause? Or, suppose that a person who does not understand the English language is thus called. Is that not sufficient ground of challenge for cause? Or, if an alien be called, one who is not an inhabitant of the town, etc. It would be simply absurd to contend that any person from either one of these three classes is not disqualified. They are embraced in three of the four items or classes named in said section 2. Upon what canon or principle of construction can it be held that section 14 means that persons mentioned in these three items are disqualified, and that those mentioned in the other item of said section 2, *viz.*, persons over sixty years of age are not disqualified? These provisions of the statute are not fairly susceptible of any other than the plain meaning of the language used. The juror as to whom the challenge for cause was denied certainly lacked one of the qualifications mentioned in section 2, *viz.*, he was not "under sixty years old."

We confess to an inability to conceive any doubt or

ambiguity or uncertainty upon this question. There is no provision in section 2 as to any qualifications except those in the four items above quoted. When section 14 states that "It shall be sufficient cause of challenge of a petit juror that he lacks any one of the qualifications mentioned in section 2," it means any one of the causes named in said four items quoted, or it is meaningless.

It is urged by attorneys for appellee that the same rule applies to grand jurors as to petit jurors. Section 9 provides that grand jurors shall be selected "possessing the qualifications as provided in section 2 of this act." That section refers to grand jurors only. Section 14 refers to *petit* jurors only. Whatever construction may be given to section 9 can not change the definite language of section 14 as to the right of challenge of *petit* jurors.

Section 14 also provides that "It shall be the duty of the court to discharge from the panel all jurors who do not possess the qualifications provided in this act as soon as the same is discovered." Section 4 gives a list of persons who are exempt from jury service, but does not mention those persons who are by section 2 disqualified. It is not provided by the statute that "It shall be the duty of the court to discharge from the panel all persons who" are exempt, but only such persons as are disqualified.

It is also further provided by section 14 that "If a person has served on a jury in a court of record within one year he shall be exempt from again serving during such year, unless he waives such exemption." Nowhere in this statute do we discover a disqualification of persons to serve as jurors outside of section 2, except that women are disqualified by section 1, because they are not legal voters. A clear distinction is provided by the statute between disqualification and exemption. Disqualification is ground for challenge for cause, and it is even made the duty of the court to discharge those who are disqualified. Exemption is the personal privilege of the juror, and is not ground for challenge.

The court erred in denying appellant's challenge for cause

of said juror, who was over sixty years of age. It was also a prejudicial error. The case of *Spies v. The People*, 122 Ill. 1, 258, is cited by appellee as conclusive upon this point. The court there says:

“We can not reverse this judgment for errors committed in the lower court in overruling challenges for cause to jurors, even though appellants exhausted their peremptory challenges, unless it is further shown that an objectionable juror was forced upon them, and sat upon the case after they had exhausted their peremptory challenges.”

The juror, Sanford, was called into the box in the *Spies* case after appellants and exhausted their peremptory challenges. They then objected to this juror for cause. The court says: “The only question, then, which we deem it material to consider, is: Did the trial court err in overruling the challenge for cause of Sanford, the twelfth juror, or in other words, was he a competent juror?” After quoting and reviewing at length the examination of that juror, the court says (p. 264): “We can not see that the trial court erred in overruling the challenge for cause of the twelfth juror.”

No peremptory challenge of the juror, Sanford, was interposed, and therefore the court was not required to examine as to whether appellants were entitled to any further peremptory challenges. Not so in the case at bar. Here appellant interposed a peremptory challenge to another juror (in fact to two), claiming that its peremptory challenges had not been exhausted. Peremptory challenges, to the number limited, are a statutory right. They are not merely a regulation as to selecting jurors. The very essence of that right is, that a party is entitled to exclude from the jury, in the trial of his cause, persons who are to him objectionable, without assigning any reason therefor. He is the sole judge of whether such persons are objectionable, and his decision of that question is final and conclusive. If, then, appellant's challenge for cause of the juror for the reason that he was over age, was well taken and should have been sustained, appellant had not in law exhausted its per-

emptory challenges. When, therefore, appellant afterward interposed a peremptory challenge, such challenge was an exercise of its statutory right, and should have been sustained. It was thus conclusively determined by the only party who could decide that question, and whose decision is not subject to review, that the person thus challenged was an objectionable juror. As such juror was retained against the objection of appellant, it is "shown that an objectionable juror was forced upon appellant and sat upon the case." Appellant was deprived of a statutory right. This was reversible error.

Inasmuch as the case must be reversed and remanded for the error indicated, we do not enter into any discussion or review of the merits.

The judgment of the Superior Court is reversed and the cause remanded.

C. H. Sigmund v. The Newspaper Company.

1. *LEASE—Covenants to Repair and Pay Rent, Mutual.*—A covenant of a landlord in a lease to repair and decorate, and a covenant of a tenant to pay rent, are mutual and dependent covenants.

2. *SAME—Covenants to Repair Within the Statute of Frauds.*—A covenant by the landlord to repair and decorate is within the statute of frauds as completely as a covenant of the tenant to pay rent.

3. *SAME—Execution by a Corporation.*—A lease executed by a corporation as follows—

"THE NEWSPAPER CO., [SEAL.]
per HARRISON BROS., Agents. [SEAL.]"

is not admissible in evidence without proof showing that the agents were authorized to thus sign the name of the corporation.

4. *STATUTE OF FRAUDS—Lease to be Signed by the Person to be Bound.*—Under the statute of frauds and perjuries (R. S., Ch. 59, Sec. 2), no action can be brought to charge any person upon any contract not to be performed within a year from the time it is made, unless such contract or some memorandum or note thereof is in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing.

5. *SAME—Part Performance in a Court of Law.*—Part performance does not, in a court of law, take the case out of the operation of the statute of frauds.

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6. COVENANTS—*When Mutual and Dependent.*—A covenant in a lease by the lessor to repair and decorate, and a covenant of a tenant to pay rent are mutual and dependent covenants, and a lease containing such covenants which is binding upon one only of the parties, is wanting in the necessary requisites of mutuality.

7. TENANCY—*From Month to Month—Termination of.*—A person occupying premises under a lease, lacking the necessary requisites of mutuality, is a tenant from month to month, and may legally terminate the tenancy at the end of any month. He is liable only for the rent for the time he occupies the premises at the rate fixed in the lease.

8. AGENTS—*Authority to Execute Deeds.*—An authority to execute a deed or instrument under seal must be conferred by an instrument under seal.

Action for Rent, on a sealed lease. Trial in the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Finding and judgment for plaintiff; appeal by defendants. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded. Opinion filed April 11, 1899.

Statement of the Case.—December 6, 1897, the "Narr. and cognovit" in this case were filed in the Circuit Court. The same day a judgment by confession was entered. The suit is to recover a sum claimed to be due from appellant for rent. Attached to the declaration is what purports to be a copy of the lease sued upon, which contains a power of attorney to appear in court and confess judgment for any rent due by the terms thereof.

December 17, 1897, an order was entered opening the judgment by confession so as to allow the appellant to plead, but the judgment to stand as security, and execution thereon was stayed. The same day it was stipulated by the parties that the cause should be heard December 27th, without a jury. December 20th, appellant filed his several pleas. December 27th appellee filed a similitur to the plea of general issue, and a demurrer to each of the other pleas. The same day the court sustained all of said demurrers, and overruled motion by appellant for leave to file additional pleas. Appellant then moved that the trial of said cause be continued to permit the taking of testimony of two absent witnesses. That motion was denied, and the cause then tried. The finding and judgment of the court was against appellant for the sum of \$3,945.63, being the same amount

as the judgment by confession. Afterward appellee remitted the sum of \$115, and the judgment was, by order of court, reduced to \$3,830.63.

The lease sued upon is under seal, is signed by appellant, and the signature of the lessor is "The Newspaper Co., per Harrison Bros., agents."

Appellant entered into possession of the premises, retained the same about two months, paid the rent for the time he continued in possession, vacated the premises, and delivered the key to an agent for appellee, and contends that he vacated the premises and surrendered possession because appellee neglected and refused to repair and decorate the premises as stipulated and agreed in said lease.

M. SALOMON, attorney for appellant.

The lease offered in evidence is a sealed instrument purporting on its face to have been executed by an agent of the plaintiff under seal. Said alleged agents had no authority under seal to execute said lease. Said lease, therefore, was not entered into by the Newspaper Company and should have been excluded by the court. Vol. 1, 2d Ed., Am. & Eng. Ency. of Law, p. 952; *Maus v. Worthing*, 4 Ill. 26; *Watson v. Sherman*, 84 Ill. 263; Vol. 1, Am. & Eng. Ency. of Law, 337; Vol. XII, Am. & Eng. Ency. of Law, 987; *Taylor's Landlord & Tenant*, 107; *Blood v. Goodrich*, 9 Wend. 68; *Shuelze v. Bailey*, 40 Mo. 69; *Wood's Landlord & Tenant*, 283; *Kidd on Corporations*, p. 270; *Humphreys v. Browne*, 19 La. Ann. 158; *Beidler v. Fish*, 14 Ill. App. 29; *Humphreys v. Browne*, 19 La. Ann. 158.

The tenancy was therefore at will, or at most from month to month. *Blake v. Kurrin*, 41 Ill. App. 562; *Jennings v. McComb*, 112 Pa. 518; *Creighton v. Sanders*, 89 Ill. 543; *Donohue v. Chi. Bk. Note Co.*, 37 Ill. App. 552.

A lease is a conveyance of an interest in land, and under the statute of frauds where it is made for a longer term than one year, it must be in writing and signed either by the party, or if signed by his or its agent the authority of his or its agent must also be in writing. Sec. 2, Chap. 59, Rev. St.; *Blake v. Kurrus*, 41 Ill. App. 562; *Hughes v.*

Carne, 135 Ill. 519; Edwards v. Tyler, 141 Ill. 454; Kozel v. Dearlove, 144 Ill. 23.

SAMUEL A. WIGHT and WIGHT & HUMPHREY, attorneys for appellee, contended that a tenant who has enjoyed use of premises is estopped to deny landlord's power to make lease. So if landlord is corporation, tenant can not allege that lease is *ultra vires*. Coppinger v. Armstrong, 8 Ill. App. 210.

A tenant can not deny the title of his landlord. Grundies v. Kelso, 41 Ill. App. 200.

The writing need not be signed, if mutual, by a party other than the party to be charged. Farewell v. Lowther, 18 Ill. 252.

It is not necessary that the agent of a corporation should be authorized under seal in order to bind corporation, but the acceptance of rent would be ratification of lease by the corporation. Oregonian R. Company v. Oregon R. & Nav. Company, 26 Fed. Rep. 505.

An agent acting for the corporation in affixing a seal to an instrument is no longer as, at common law, required to have a power under seal. American & English Enc., Vol. 4, p. 243.

Tenant may recoup damages for breach of covenant to repair, in actions for rent, or may refuse to enter for breach of covenant to repair, before beginning of term, but can not enter and refuse to pay rent on account of such breach. Reno v. Mendenhall, 58 Ill. App. 87.

And can not abandon premises for failure to repair. Wright v. Lattin, 38 Ill. 293.

MR. JUSTICE HORTON delivered the opinion of the court.

The declaration in this case contains but one count, and that is special upon the written lease thereto attached. It is for the demise of Store No. 86 Fifth avenue, Chicago. Among other things it is provided in said lease as follows:

"It is agreed that the party of the first part (appellee) shall divide the two stores eighty-four (84) and eighty-six

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(86) Fifth avenue, by a suitable partition, and will repair and decorate the interior of said store number eighty-six (86) Fifth avenue." Said lease is a sealed instrument, and is signed and sealed by appellant. The other signature and seals are as follows, viz.:

"THE NEWSPAPER Co., [SEAL.]
per HARRISON BROS., agents. [SEAL.]"

The lease was for the term of three years, and the term was not to commence at the time the lease was made, but some twenty days thereafter. Appellant testified that the last he heard about the store was in October, 1894, more than three years prior to the time this judgment was entered. The judgment was entered by confession, under a power of attorney contained in said lease, and without notice to appellant, who promptly moved to set the judgment aside. One of the pleas which he was permitted to file, set up lack of mutuality because appellee was not bound by said lease. Appellee's demurrer to such plea was sustained, and properly so, as to that question, because the declaration averred that appellant occupied said store during the entire term of said lease.

When the lease was offered in evidence on behalf of appellee, its admission was objected to because it was not shown that there was any authority to sign it, and because it was void under the statute of frauds. In the propositions of law submitted to the trial court, the same questions were presented, and afterward preserved in the motion for a new trial and in the assignment of errors.

The covenants in the lease are mutual and interdependent. It contained the covenant above quoted as to repairs and interior decorations to be done and made by appellee. The evidence tends to show that that covenant was not kept by or on the part of appellee. The lease, as shown, purports to be under seal, and to be executed by a corporation (appellee), by a firm as agents. There is no evidence to establish the liability of appellee to perform the covenants of said lease. The lease lacks the necessary element of mutuality.

The testimony does not show any ratification of the

lease, as a covenant obligation, by appellee. Any ratification must be in writing. *Ingraham v. Edwards*, 64 Ill. 526.

There is no claim made that it was so ratified.

There is no statement or recitation in the lease, nor is there any averment in the declaration that Harrison Bros. were the agents of appellee, or that they had any authority to execute said lease. Neither is there any testimony showing such authority. There is nothing in this case upon which such authority can be claimed, except the signature in the form quoted. That is not sufficient when objected to in apt time, and when it is not in any manner waived.

It is provided by the statute on frauds and perjuries (Ch. 59, Sec. 2), that "no action shall be brought to charge any person upon any contract * * * (such as the lease in question), unless such contract or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party."

It is not contended on the part of appellee that there was any such authority, in writing, as required by this statute. Appellee is to be charged by the lease as to its covenants to repair and decorate, the same as appellant is to be charged thereby as to his covenants to pay rent. It is not necessary to determine whether this lease would be binding upon appellant in case there was no covenant to be kept on the part of appellee, in consideration of which, in whole or in part, appellant was to pay rent. This lease, under the facts and circumstances here presented, is wanting in the necessary requisite of mutuality.

The covenant in the lease to repair and decorate, and the covenant of appellant to pay rent, are mutual and dependent. *Lunn v. Gage*, 37 Ill. 20, 28.

The covenant to repair and decorate is within the statute of frauds as completely as is the covenant of appellant to pay rent. *O'Leary v. Delaney*, 63 Me. 584.

Appellant was liable for the rent for all the time he occupied the premises at the rate fixed in the lease. But that he has paid in full. This leasing was, in a court of law, a

tenancy from month to month. *Blake v. Kurrus*, 41 Ill. App. 562; *Creighton v. Sanders*, 89 Ill. 543.

Appellant might legally terminate the tenancy at the end of any month. (*Donohue et al. v. Chicago Bank Note Co.*, 37 Ill. App. 552.) He did so at the end of the second month. Part performance does not, in a court of law, take the case out of the operation of the statute. *Chicago Atchmt. Co. v. Davis S. M. Co.*, 142 Ill. 171.

There are numerous points urged in the briefs and arguments which we do not deem it necessary to discuss. The declaration avers that appellant occupied said store for the full term named in said lease. There is no present claim that this is correct. The evidence is undisputed and conclusive, that appellant occupied said store but two months, and that he paid the rent in full therefor. Appellee must, then, recover in this case, if at all, simply and only upon the covenant of appellant in the lease, to pay rent. This, as we have endeavored to show, it can not do.

The judgment of the Circuit Court will be reversed, and the cause remanded.

Reversed and remanded.

MR. JUSTICE SHEPARD.

I concur that the judgment must be reversed and the cause remanded, but not upon the grounds or for the reason stated in the majority opinion.

The judgment without a declaration to support it can not stand. *Tucker v. Gill*, 61 Ill. 236.

If a declaration were ever filed in the case, the abstract does not show, it or refer to where in the record it may be found, and the rule is uniform, and has been many times announced, that an appellate tribunal will not hunt through a record to find something that the abstract does not refer to.

Garrity v. Geo. A. Fuller Co.

Patrick Garrity v. Geo. A. Fuller Company.

1. INSTRUCTIONS—*To Find for Defendant—When Erroneous.*—In an action for personal injuries, where reasonable minds may reasonably differ upon the evidence of negligence as charged in the declaration, the cause should be submitted to the jury.

Action for Personal Injuries.—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Verdict and judgment for defendant by direction of the court. Appeal by plaintiff. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed March 16, 1899. Rehearing denied April 13, 1899.

GEO. WILLARD and SMITH & WRAY, attorneys for appellant.

JOHN A. POST and O. W. DYNES, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

Appellant sued appellee in case for an injury to his person. He was injured in a ditch or trench dug for a curb wall, by the caving in of a ditch.

At the close of plaintiff's evidence, the court peremptorily instructed the jury to find the defendant not guilty. After carefully reading and considering the evidence, we are of opinion that reasonable minds may reasonably differ as to whether or not the evidence showed that the defendant was guilty of the negligence charged in the declaration, and therefore the case should have been submitted to the jury.

The judgment will be reversed and the cause remanded.

West Chicago St. R. R. Co. v. John Marks, by His Next Friend.

1. RAILROAD COMPANIES—*Placing Tracks Near Obstructions.*—Where a railroad company places its tracks so near an obstruction, which it is necessary to pass, that its passengers, in getting on or off its cars, and while upon them, are in danger of being injured by contact with such

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obstruction, it is a fair question for the jury, whether the company is, or is not, guilty of negligence.

2. *SAME—Permitting Obstructions Near to Tracks.*—It is inexcusable in a railroad company to permit an obstruction to stand so near its track as to render the use of the steps or running boards of its cars dangerous.

3. *SAME—Passengers Riding on the Foot-Boards.*—It is not negligence *per se*, for a passenger, under the circumstances of this case, to ride upon the foot-board, whether other passengers were riding upon it or not.

4. *VERDICT—Will Aid a Defective Statement.*—A verdict will not cure the statement of a defective cause of action, but it will aid the defective statement of a cause of action.

5. *ARREST OF JUDGMENT—After Verdict.*—After verdict, a judgment will not be arrested for any defect in the declaration, which by reasonable intendment must have been proved, or where the requisite allegation may be considered as part of what is already alleged in the declaration.

6. *SAME—For Defects in Pleading.*—Where there is a defect, imperfection or omission in a pleading, which would have been a fatal objection on demurrer, if the issue joined is such as necessarily required on the trial, proofs of the facts defectively stated or omitted, and without which it is not to be presumed that the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission is cured by verdict.

Action for Personal Injuries.—Trial in the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the March term, 1899. Affirmed. Opinion filed April 11, 1899.

ALEXANDER SULLIVAN, attorney for appellant; EDWARD J. McARDLE, of counsel.

A. P. PICHEREAU and BURTON & REICHMANN, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The appellee was a passenger upon one of appellant's cable trains operated upon and over its Milwaukee avenue line, crossing the Desplaines street viaduct. The train consisted of a grip-car and two open trailers. He boarded the rear trailer at Randolph street and Fifth avenue, and took his place upon the foot-board of the car running along its south side, which became the west side of the car when its course was changed northwardly. The seats were all occupied,

and the aisles and platform and foot-boards upon both sides of the car, were partly filled by people standing.

Appellee stood upon the foot-board, facing generally toward the inside of the car, and holding to the handles of the two rear seats next to him. He had never before ridden over the viaduct, and did not know of it. While so standing, he paid his fare to the conductor, but was not warned or notified in any way of the peculiar danger of the place in crossing the viaduct. The conductor, testifying for the appellant, said he did not remember telling him anything about it, and (we quote from the abstract) added, "it is a very common thing to ride on the foot-board of the car; we don't say anything to them; we just let them ride there if they want to; we collect fares in the usual way; we don't tell them anything about this viaduct they're approaching."

In crossing the viaduct, appellee was struck by one of the upright iron posts or braces of the truss, first on the left shoulder, and, being partly turned around by its force, was then struck on the right shoulder, and then losing his grasp on the seat handles, fell, but again caught some other part of the car and was drawn along, his feet dragging, until finally he lost all hold and fell, and for his injuries this suit was brought. His right collar-bone was broken, and he was otherwise bruised. The verdict and judgment were for \$1,500.

There is substantially no conflict concerning the manner of the accident. The distance of the car from the projections of the truss is in dispute, but it only varies seven inches, and the variation may, perhaps, arise from the different parts of the car measured from. The greatest measurement is nineteen inches, and the least twelve inches. Whatever the exact distance may be, it was testified by several witnesses that for a person riding upon the foot-board, as appellee was, it was necessary, in order to avoid getting hit, to use extra precautions.

Three of appellant's witnesses testified upon cross-examination, concerning the subject. One of them said: "You had to bend your body when you passed over; you have to

bend in toward the car; you have to bend your whole body in order to prevent yourself from getting hit."

Another of them testified: "There was no danger riding over that viaduct (on the foot-board) if you knew the center brace was there; by simply pushing your body in toward the body of the car you could avoid the viaduct very easily; you could stand straight while this car passed and not get touched—standing straight on the side * * * you could stand that way, but you would have to nudge up against the side of the car; you would have to nudge in."

Another of them testified: "There wasn't any danger riding on that foot-board when you knew the fact that the viaduct was there and inclined your body in toward the car to avoid it. * * * If I happen to ride on the foot-board, as I approach the viaduct I just bend my body in toward the car. That is a practice of everybody else, I should judge."

It is not necessary to repeat the testimony of appellee's witnesses upon the same subject. What was drawn from appellant's witnesses is all that is needed to show that the jury had before them enough evidence to pass upon the question whether, under the proved circumstances, the appellant was guilty of negligence, or not, in the performance of its duty to appellee as a passenger.

As said in *North Chicago St. R. R. Co. v. Williams*, 140 Ill. 275: "Where a railroad company places its tracks so near an obstruction, which it is necessary for its cars to pass, that its passengers, in getting on or off the cars, and while upon them, are in danger of being injured by contact with such obstruction, it is a fair question for the jury, whether the company is, or is not, guilty of negligence. * * * It has been held that it is inexcusable in a railroad company to permit an obstruction to stand so near its track as to render the use of the step or running-board dangerous to life or limb, inasmuch as exceptional cases may arise when it is lawful and proper for even a passenger to use such stepping-board."

And such doctrine must be doubly sound, when, as in this case, the company has, by persistent usage, allowed, and

tacitly invited, its passengers to ride upon the foot-boards of its cars in such perilous proximity to dangerous obstructions, without warning of the risk. As appears by the evidence in this case, the use of the foot-board was, in fact, one of the places provided by the company for its passengers to ride upon, and it was not an exceptional use of it that was made by appellee.

Moreover, the appellee testified, and he was in no way contradicted, that he was going to a part of the city in which he had never been before, and did not know of the viaduct being upon his route until he was hit.

A custom of carrying passengers, numerous of whom may be strangers, in such positions in close proximity to fixed and dangerous obstructions, without notice or warning of any kind, need not be characterized by us, for such is not our duty. It is the duty of the courts, however, to see that the rules of law applicable to carriers and passengers are not relaxed in favor of such methods.

Appellant's counsel make the point, that because of a reply by the court, in the form of an instruction, to a communication from one or more of the jury, error arose.

It was no concern of the jury, so far as this case was concerned, what relationship existed between the city of Chicago and the appellant with reference to the use of the viaduct, nor whether the tracks were laid in the place they occupied by virtue of municipal direction. If as a matter of fact it were negligence for the appellant to lay its tracks so near the truss, and to operate them there without warning to passengers, no arrangement between it and the city concerning the matter would excuse the negligence in an action for damages because of it. *West Chicago St. R. R. Co. v. Annis*, 165 Ill. 475; same case, 62 Ill. App. 130.

Considerable stress is laid in argument by appellant, that the appellee was guilty of contributory negligence, and therefore, ought not, in law, to recover.

And it is largely based upon the fact that appellee boarded an overcrowded car. The injury was not the proximate result of the car being overcrowded, but was because

the car was run so near to the viaduct truss, of which appellee had no knowledge or notice until after the accident. He therefore did not contribute to the proximate cause of the injury, which is a brief way of stating when the negligence of an injured person is contributory to the injury so as to preclude him from a recovery.

It was not negligence *per se*, for the appellee, under the circumstances, to ride upon the foot-board, whether other passengers were riding upon it or not. West Chicago St. R. R. Co. v. McNulty, 64 Ill. App. 549, affirmed, 166 Ill. 203.

The cases of steam railroads that are cited, are not, in numerous respects, applicable to street railroads. It was for the jury to say whether appellee had knowledge or notice of the existence of the proximate danger, or ought, under the circumstances, to have had it. We do not say that if the appellee had known of the viaduct the cars were to cross, and of the location of the tracks with reference to the truss, he would not have been bound to use more than ordinary care to avoid being hit, but we do hold that under the proved facts and circumstances, ordinary care for his own safety was all appellee was required to exercise, and that the verdict has settled that question in his favor, upon evidence that would not have properly warranted any other result.

The only remaining point we feel called upon to discuss, is that concerning the declaration, which, it is insisted, is so defective that appellant's motion in arrest of judgment should have been sustained.

We have examined the two counts of the declaration with reference to the defects that are pointed out, and while it is not improbable that if a demurrer to them had been interposed, it should, properly, have been sustained, yet we discover no deficiency in the counts or either of them that was not cured by the verdict.

A verdict will not cure the statement of a defective cause of action, but it will aid the defective statement of a cause of action. Barnes v. Brookman, 107 Ill. 317.

"After verdict on a motion in arrest of judgment, a court will intend that every material fact alleged in the declaration or fairly inferable from what is alleged, was proved on trial. After verdict judgment will not be arrested for any defect in the declaration which, by reasonable intendment, must have been proved, or where the requisite allegation may be considered as part of what is already alleged in the declaration. Where the plaintiff states his cause of action defectively, it will be presumed, after verdict, that all circumstances, in form and substance, to complete the title so defectively stated, were proved at the trial, as they must have been proved in order to entitle the plaintiff to recover." *Cribben v. Callaghan*, 156 Ill. 549.

"On behalf of appellant it is urged the motion in arrest of judgment should have been sustained on the ground there was no averment in the declaration that deceased was in the exercise of due care at the time of the accident. Conceding the declaration to have been demurrable because of such omission, it does not follow that, after verdict, a motion in arrest of judgment based on such defect, should be sustained. Where there is any defect, imperfection or omission in any pleading, whether in substance or in form, which would have been a fatal objection on demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so imperfectly or defectively stated or omitted, and without which it is not to be presumed that the judge would direct the jury to give, or the jury would have been given, the verdict, such defect, imperfection or omission is cured by verdict." *B. & O. S. W. R. R. Co. v. Then*, 59 Ill. App. 561; same case, 159 Ill. 535.

The motion in arrest of judgment was properly overruled.

Having considered the case fully, it remains only to affirm the judgment. Affirmed.

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Joseph B. Ditto v. James Pease, Sheriff, et al.

1. *REPLEVIN—Requisites of the Plaintiff's Case.*—Under the statute the plaintiff in a replevin suit must show that as he is the owner of the goods in question or the person entitled to the possession. (Rev. Stat. Chap. 119, Sec. 1.) He is not, however, in all cases required to show that he is entitled to the possession as against all the world, but only as against the defendant in the replevin proceedings.

2. *SAME—Possession as Against Strangers and Wrongdoers.*—A party may not be entitled to the possession as against the owner, but at the same time he may be entitled to such possession as against a stranger or wrongdoer, or against all the world except the owner.

3. *SAME—Mortgagee's Possession by His Agent.*—A person in possession of mortgaged goods by virtue of chattel mortgage and by direction of the mortgagee, and who has incurred expenses in the care of such goods and is entitled to compensation therefor, and for his services, is not to be regarded as a mere servant who has possession of goods by delivery from his master, which the master may at any time terminate, but he has an interest in and right to the possession of such goods sufficient to maintain replevin as against a wrongdoer or person having no title to or interest in such goods.

Replevin.—Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Finding and judgment for defendant; appeal by plaintiff. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded. Mr. Justice SHEPARD dissenting. Opinion filed April 11, 1899.

Statement of the Case.—This is a suit in replevin brought by the appellant. Lehman Picard executed four chattel mortgages given to secure his four promissory notes. These notes and mortgages were placed in the hands of Messrs. Moses, Pam & Kennedy, as attorneys for the holders thereof. August 16, 1895, said notes and mortgages were placed in the hands of appellant by said attorneys for the purpose of having said mortgages foreclosed. Appellant was then a county constable, but acted in this matter only in his individual capacity. Upon receiving the mortgages appellant went to the store of the mortgagor and took possession of the stock of goods; closed the place; locked the doors; put his name up as agent for the mortgagees, and kept possession until August 20, 1895.

The day last named the property in question was taken from the possession of appellant by a deputy sheriff who

claimed that he had, and who read to appellant what purported to be, a writ of replevin. J. P. Evans, representing the Hoosier Manufacturing Co., was with the deputy. No such writ is offered in evidence, and none appears in the record.

Appellant, upon his own responsibility and at his own expense, employed a custodian who remained in charge of the goods night and day. The appellant says that he looked to the property for his fees and expenses; that he had an interest therein to that extent. He recovered possession of the property taken by the sheriff under and by virtue of the writ of replevin in the case at bar. Afterward he sold the property, paid the proceeds to the attorneys, who paid him his fees and expenses out of such proceeds.

The affidavit upon which the writ in this cause was issued, is made by appellant. He there stated as a ground for the issuing of said writ, that he was "lawfully entitled to the possession" of the goods in question. The declaration counts in *cepit*, in *detinet* and in *trover*. Defendants plead (1) *non cepit*, (2) *non detinet*, (3) not guilty as to the count in *trover*, (4) property in defendants, and (5) property in Hoosier Mfg. Co.

MOSES, ROSENTHAL & KENNEDY, attorneys for appellant.

"As against a wrongdoer, prior possession alone is sufficient to enable the plaintiff to maintain the action. If the right of the plaintiff is better than that of the defendants, whatever it may be with regard to the rest of the world, possession is sufficient evidence of right against every one who is neither the true owner nor rightfully possessed. 1 Smith's L. C., Vol. 1, p. 648."

Prior possession of property is sufficient in itself to authorize the beginning and maintaining of a replevin action as against wrongdoers. Searles v. Crombie, 28 Ill. 396; Knisely v. Parker, 34 Ill. 481; Cummins v. Holmes, 109 Ill. 15; Bartleson v. Mason, 53 Ill. App. 644.

It is a general rule that, without an absolute or special property in the thing alleged to have been wrongfully con-

verted, trover can not be maintained, and a right of immediate possession before or at the time of the conversion is essential. 1 Chit. Pl., 149; *Eisendrath v. Knauer*, 64 Ill. 396.

It is the recognized law that a person having a special property in goods may maintain trover against a stranger who takes them out of his actual possession, as a sheriff, a carrier, a factor, a warehouseman, consignee, a pawnee, or trustee, or an agister of cattle, or a gratuitous bailee, or any person who is responsible over to his principal. 1 Chit. Pl. 151; *Eisendrath v. Knauer*, 64 Ill. 396.

In all of these cases the action is said to lie in favor of the person having a special property in goods against a stranger who takes them out of the actual possession of such person. The nature of this special property, essential to the action of trover, is not very accurately defined, and seems to be dependent upon the circumstances of the case. *Eisendrath v. Knauer*, 64 Ill. 396.

NEWMAN, NORTHRUP & LEVINSON, attorneys for appellees, contended that Ditto was a mere servant and employe of the mortgagees; had neither a general nor special interest in the property, and could not sustain an action of replevin therefor. *Fullerton v. Morse*, 162 Ill. 43; *Am. & Eng. Ency. of Law*, Vol. 10, p. 1054; *McNorton v. Akers*, 24 Iowa, 369; *Wells on Replevin*, 1879 Ed., Secs. 144, 115, 644; *Clark v. Skinner*, 20 Johns. (N. Y.) 465; *Cobbey on Replevin*, Secs. 99, 132, 150.

The plaintiff in replevin must recover on the strength of his own title, and where his title is denied, as in this case, the burden of proof is on him, to show a general or special property in the goods themselves; *Reynolds v. McCormick*, 62 Ill. 412; *Chandler v. Lincoln*, 52 Ill. 74; *Dobbins v. Hanchett*, 20 Ill. App. 396; *Constantine v. Foster*, 57 Ill. 36; *Anderson v. Talcott*, 1 Gilm. 365; *Atkins v. Byrnes*, 71 Ill. 326; *Pope v. Jackson*, 65 Me. 162; *McIlvaine v. Holland*, 5 Harr. (Del.) 226; *Holler v. Coleson*, 23 Ill. App. 324.

MR. JUSTICE HORTON delivered the opinion of the court. Upon the trial of this cause appellees offered no testimony,

and there is no testimony to support the fourth and fifth pleas. Appellees rely entirely upon the alleged lack of testimony to support appellant's claim, *i. e.*, they depend for success upon the weakness of appellant's case.

The only testimony which it is claimed tends to show any right, title or interest in appellees, or either of them, in or to the property in question, is the fact that a deputy sheriff took such property upon what purported or was claimed to be a replevin writ. No such writ is offered in evidence. It does not appear who the parties thereto were, if there was such a writ, or whether the sheriff had turned such property over to some claimant, and if so, to whom, before it was taken under the writ in the case at bar; or whether the sheriff had or represented any title to or interest in said property. The mere fact that a deputy sheriff took the property upon what purported to be a writ of replevin, without producing such writ and without any testimony as to whether it was issued by a court having jurisdiction, or as to any other fact in regard to it, is insufficient to support any title or claim to, or any right to the possession of the property in question.

There is no evidence in this case tending to establish any right, title or interest in or to said property, or any part thereof, in the other appellees, or either of them.

The question then is: Had the appellant such an interest in, or right to the possession of, the property in question, that he can maintain replevin therefor against a stranger?

Under the statute of Illinois, the plaintiff in a replevin suit must show that as to the goods in question he is "the owner or the person entitled to the possession" thereof. Rev. Stat., Chap. 119, Sec. 1. He is not, however, in all cases required to show that he is entitled to the possession as against all the world, but only as against the defendant in the replevin proceeding. He may not be entitled to the possession as against the owner, but at the same time he may be entitled to such possession as against a stranger or wrongdoer, or as against all the world except the owner. There are cases, also, where either the owner or the party

in possession may maintain the proceeding. And in some cases the party in possession may maintain replevin against the owner.

"A mere servant who has possession of goods by delivery from his master, which the master may at any time put an end to, has not such property or right of possession as will enable him to sustain" replevin. Appellees quote, and place great stress upon this rule, and nearly or quite all the cases they cite upon this branch of the case are to the same effect, and in support of this rule.

The difficulty in applying this rule arises when it is sought to determine who is a "mere servant."

"The line of demarcation between the relation of principal and agent, and that of master and servant, is exceedingly difficult to define. * * * The true distinction is to be found in the nature of the undertaking, and the time and manner of its performance. * * * Agents, as a rule, are employed rather as particular occasion may require, than for fixed periods; and receive their compensation rather in fees and commissions than in fixed wages or salary." *Mechem on Agency*, Sec. 2.

Other text writers are the same in substance.

Appellant was in possession of the goods in question under and by virtue of the mortgages mentioned, by direction of the mortgagees. His possession, however, was not exclusively for or in the interest of the mortgagees. He had a duty to perform to, and in the interest of, the mortgagor. The mortgagees could not have compelled him to surrender possession without paying or tendering to him such sum as he had properly expended in the care and protection of the property, as well as his legitimate fees or charges for services. He was not a "mere servant."

The case of *Fullerton v. Morse*, 162 Ill. 43, is cited as being "on all fours" with the case at bar. In that case the only interest or title which the plaintiff had in or to the property replevied or the possession thereof was, that he had been authorized by the mortgagee to take possession of the property under the mortgage for condition broken. He was not in possession of the property or any part of it, had not paid or incurred any expense on account of it, had no

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personal interest in it, had done nothing in regard to it except to make a demand in writing for its possession, "and therefore was not responsible for it to anybody," as the Supreme Court says.

And further, in that case it was shown that the defendant, as a constable, had levied upon and was in possession of the goods. The court says (p. 45):

"He was a constable *de jure*, his executions were regular, and the mortgagor had such an interest as made them liable to the levy."

We need not further examine the Fullerton case to show not only that it is not "on all fours" with the case at bar, but that, when the facts in the two cases are considered, the opinion of the Supreme Court has but little, if any, application to the case at bar.

We are of the opinion that appellant was more than a "mere servant," and that he had such an interest in, and right to the possession of the property in question, that he can maintain this suit.

The point as to "cross-replevin" is not before us under the testimony.

The judgment of the Superior Court will be reversed and the cause remanded.

MR. JUSTICE SHEPARD.

I think that under the evidence, Ditto was a mere servant of the mortgagees and had no interest, legal or equitable, in the property, and was not entitled to the possession thereof within the meaning of the statute, and therefore not entitled to maintain replevin.

Martin Lehman v. Frederick P. Bagley.

1. MASTER AND SERVANT—*Presumption that the Servant Knows the Condition of Appliances.*—The legal presumption is that a servant knows the condition of materials, machinery or appliances which he has constant opportunity to inspect, and which his regular duties bring under his notice.

2. **SAME—Duty of Servant to Use Precautions to Avoid Danger.**—If a servant has knowledge of precautions, by using which danger may be avoided, he should use such precautions.

Action for Personal Injuries.—Trial in the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Verdict and judgment for defendant by direction of the court: error by plaintiff. Heard in this court at the October term, 1898. Affirmed. Opinion filed February 23, 1899. Rehearing denied April 13, 1899.

Statement of the Case.—This is error to reverse a judgment for defendant in error in an action by plaintiff in error for a personal injury, alleged by plaintiff to have been occasioned by the defendant's negligence. At the close of the plaintiff's evidence, the court instructed the jury to find the issues for the defendant. The facts are substantially as follows: The plaintiff had been in the employ of defendant for eighteen months, at the time of the accident herein-after mentioned. His duties were unloading sand from cars, trucking stone from one car or place to another car or place, and working at a derrick which was used to hoist stone when necessary. He worked at the derrick many times before the accident. The derrick was what is called a boom derrick, having a perpendicular beam or mast twenty-six feet high and thirteen and one-half inches square, and a boom or movable piece of timber, extending transversely from the mast and at an angle with it, twenty-eight feet long, other dimensions twelve inches by thirteen inches. The shaft by which bodies were raised or lowered was operated by hand, by means of handles which fitted on to the ends of the shaft. These ends were iron, square, and about one and three-fourth inches in length. There was a drum on the shaft, round which the cable ran and to which it was fastened. The square iron ends of the shaft, on to which the handles were placed (and which the witnesses call keys, for what reason is not apparent), were worn toward the outer ends, as the witnesses testified, about one-eighth of an inch, so that when the handles were on, there was a "play" between the handles and the ends of the shaft of about one-fourth inch. When the handles or cranks were

on, the ends of the shaft protruded through them one-half inch. There were wheels and cogs connected with the running machinery or appliances of the derrick, not necessary to be noticed in detail. Previous to the time of the accident, the invariable custom, well known to the plaintiff, was to use the handles or cranks in hoisting stones and not in lowering them. The custom in lowering them was to take the handles off and use a rope wound around the shaft, and the uncontradicted evidence is, that prior to the time of the accident stones had always been so lowered, and never by the use of the cranks or handles. The accident occurred about two o'clock P. M., June 6, 1896 under the following circumstances: A large stone, about three and one-half feet in thickness, five and one half feet in width, eleven or twelve feet long, and estimated to weigh about eighteen tons, was brought to defendant's yard on a car. A chain was put around the stone, to which a hook connected with the cable was attached, and an order was given by Tom Kerrigan, one of the men on the car, to hoist up. Plaintiff was at the handle at one end of the shaft, and Steve Ramski and Pat Kerrigan, fellow-servants of the plaintiff, and who did like work with him, at the handle at the other end of the shaft. The weight on each handle in hoisting was sixty-five pounds. When they hoisted the stone high enough from the car, about one and one-half inches, to swing it off, they moved it around by means of the boom over the place where it should be let down, when an order was given by Tom Kerrigan, "Lower down." They then started to lower it down by means of the handles, when, after a number of revolutions of the shaft, the handle which Ramski and Pat Kerrigan were operating, came off the end of the shaft, throwing the entire weight, 130 pounds, on the handle operated by the plaintiff, when the shaft commenced revolving rapidly and jerked the crank out of plaintiff's hands, and the crank or handle struck him on the arm. The evidence in relation to the injury is very slight, a physician testifying, merely, that he examined plaintiff's right

arm some time before the trial, and found evidence of fracture near the wrist, and also higher up between the wrist and elbow. Ramski's account of the matter is as follows:

"We never lowered stone with the handles before, and we never tried to before until this time. The difference between raising a stone and letting it down is, in raising it you are always pulling or shoving steady, and in lowering it, when you get it up this way (indicating with his hands), it gives a jerk. When we raise it, it will always pull on the shaft steady, but when we lower it, it always gives a jerk. It makes no difference while one side is up and the other side is down. When the stone is lowered it gives two jerks every time it turns around once, no matter if there are two men on it; I know it because I worked on it. I did not know it was dangerous to lower it; it was the first one we ever tried to lower with the handles, and the first time that it happened that the handle slipped off; it never slipped off before, and I never saw it slip off with Kerrigan or any one else; this was the first time it ever happened; it slipped off all of a sudden."

The evidence is that prior to June 6, 1895, no accident had occurred in using the derrick. There is no evidence that there was any change in the condition of the derrick during the eighteen months that plaintiff was in defendant's employ. Ramski testified that he had been in defendant's employ for eleven or twelve months prior to the accident, and that the ends of the shaft on which the handles were placed in using the derrick, were no more worn than they were when he was first employed. Prior to the time of the accident, the heaviest stone moved by the derrick weighed from five to eight tons.

KING & GROSS, attorneys for plaintiff in error.

JOHN A. POST and JOHN B. BRADY, attorneys for defendant in error.

MR. JUSTICE ADAMS delivered the opinion of the court.

It is apparent from the evidence that the derrick was reasonably safe for the purpose for which it was used, when

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used in the manner in which it had invariably been used before the accident; also, that no order or direction was given to use it in any other than the accustomed way. The order, "Lower down," did not, in the least, imply the lowering in other than the usual manner, namely, by means of a rope around the shaft, the handles being removed. Therefore, when plaintiff and his fellow-servants undertook to lower the stone in an essentially different manner from that before invariably used, well knowing that the accustomed manner had proved to be safe, and being ignorant of the probable consequences of the new experiment, they assumed the risk of the new method which, without direction from any one, they adopted. If there was any negligence, it was that of plaintiff and his fellow-servants in departing from the usual and safe method of using the derrick, or of his fellow-servants in permitting the handle or crank, which they were using to come off the end of the shaft, or these two combined. The legal presumption is, that a servant knows the condition of materials, machinery or appliances which he has a constant opportunity to inspect, and which his regular duties bring under his notice. *Shearman & Redf. on Negligence*, 4th Ed., Sec. 216.

In the present case the plaintiff's evidence is that he and his fellow-servants had ample opportunity to know the exact condition of the derrick; and there is no evidence that any complaint or suggestion was ever made to defendant that it was at all defective. It is also the law that if a servant knows of precautions, by using which, danger may be avoided, he should use such precautions. *Id.*, Sec. 214. The derrick having invariably been used for a long time in a certain way with safety, and without accident, it is a reasonable, if not unavoidable inference, that the master, the defendant, directed its use in that way, and that an essential departure from that way was disobedience of the master's directions. We are of opinion that there can not be a recovery on the evidence, and that there was no error in directing a verdict for the defendant. The judgment will be affirmed.

West Chicago St. R. R. Co. v. Emanuel Levy.

1. **STREET CAR COMPANIES—*Reciprocal Rights of Persons in the Streets.***—All persons have the lawful right to drive in the car tracks, subject only to their duty of exercising due care to avoid undue interference with the reciprocal right of the company, and to avoid collisions, and while so driving, the law guarantees to them protection against such a negligent operation of the tracks by the company, as inevitably leads to their injury.

2. **ORDINARY CARE—*A Question of Fact.***—Whether a person driving in a street occupied by street car companies, is in the exercise of ordinary care, under the circumstances of the situation, for his own safety, is a question of fact for the jury.

3. **JUDGMENTS—*Preponderance of Evidence Not Sufficient to Reverse.***—The mere preponderance of evidence in respect to numbers, and in opportunities for seeing the things about which they testify, is not enough to justify the reversal of a judgment.

4. **SPECIAL DAMAGES—*Particularity in Pleading.***—Special damages are such as really take place, but are not implied by law; are either superadded to general damages arising from an act injurious in itself or are such as arise from an act not actionable in itself, but injurious in its consequences.

5. **SAME—*Reasons for Requiring Particularity in its Pleading.***—The reason or ground for requiring particularity in the statement of special damages, in order to entitle the plaintiff to give evidence thereof, is to avoid surprise to the defendant.

6. **SAME—*Allegations of, When Unnecessary.***—Injuries to particular parts of the body do not require to be specially set forth in the declaration in an action for personal injuries, and evidence supporting them may be shown as natural results following upon, or flowing from, the general injury set forth.

7. **ATTORNEYS—*Improper Conduct to be Excepted to.***—The question of the conduct of counsel during the trial can not be raised in the Appellate Court as a reason for reversing the judgment where no ruling of the trial court upon the same was had and exception taken.

MR. JUSTICE HORTON:

8. **PLEADING—*Special Damages.***—Whenever the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law, in order to prevent surprise on the defendant, the plaintiff is required to state the particular damage he has sustained, or he will not be permitted to give evidence of it.

9. **SAME—*Allegations of Special Damages.***—Where the damages, through the natural consequences of the act complained of, are not the necessary result, they are termed special damages, which the law does

not imply, and to prevent a surprise upon the defendant they must be particularly specified in the declaration, or the plaintiff will not be permitted to give evidence of them on the trial.

Action for Personal Injuries.—Trial in the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Mr. Justice HORTON dissenting. Opinion filed April 11, 1899.

ALEXANDER SULLIVAN, attorney for appellant; JOHN B. BRADY, of counsel.

Only general damages, or such damages as necessarily and naturally result from the act complained of, can be proved under a general allegation of damages. Sutherland on Damages, Vol. 1, page 763.

Special damages are such damages as may naturally, but do not necessarily, result from the act complained of, and such damages have to be specially pleaded in order to admit evidence in proof. Sutherland on Damages, Vol. 1, page 763; Chitty on Pleadings, Vol. 1, star page 397; Olmstead v. Burke, 25 Ill. 86; Shipman's Common Law Pleading, (2d Ed.), 489-90.

Whenever the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law, then in order to prevent surprise on the defendant which might otherwise ensue on the trial, the plaintiff must in general state the particular damage which he has sustained, or he will not be permitted to give evidence of it. Chitty on Pleadings, Vol. 1, star p. 397.

It is a rule of pleading, whenever the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law, then in order to prevent surprise the plaintiff must state the particular damage he has sustained, or he will not be permitted to give evidence of it. Olmstead v. Burke, 25 Ill. 86; Furlong v. Polleys, 30 Maine, 491; Miles v. Weston, 60 Ill. 364.

When the damage to be laid is the necessary and proximate consequence of the act complained of, the law presumes it to have resulted from that act and it is sufficient

to describe it in general terms, for the reasons that the presumptions of law are not in general to be pleaded as facts. But when the law does not necessarily imply that the plaintiff sustained damage by the act complained of, it is essential to the validity of the declaration that the resulting damage, called special damage, be shown with particularity. Such damages are what really took place, though not implied by law, and are either superadded to general damages arising from an act injurious in itself, or such as arise from an act different and not actionable in itself, but injurious in its consequences. Shipman on Common Law Pleading, page 489.

JOHN F. WATERS, attorney for appellee.

Improper remarks of counsel, made to equally improper remarks of opposing counsel, are not grounds for reversal. N. Y. Cen. R. R. Co. v. Lubeck, 41 N. E. Rep. (Ill.) 897.

Improper remarks of counsel are not to be considered, unless a specific objection was made and an exception saved at the time. Ill. Cent. R. R. Co. v. Cole, 46 N. E. Rep. (Ill.) 275.

MR. JUSTICE SHEPARD delivered the opinion of the court.

Appellee recovered in the Circuit Court a verdict and judgment for \$10,000, for alleged personal injuries. He was driving north in the car tracks of the appellant along and upon Robey street, in Chicago, and was overtaken by an electric car moving in the same direction, and operated upon the same tracks in which he was driving, and in the collision that ensued, the injuries complained of were suffered.

Much argument has been expended, and considerable evidence was heard, upon some circumstances which are altogether immaterial, except, perhaps, as affecting the credibility of witnesses who testified in behalf of appellee, and we will spend no time in magnifying their importance by a discussion of them.

Appellee had the lawful right to drive in the car tracks whether the snow that was on the ground was deep or not, subject only to his duty to exercise due care to avoid an undue interference with the reciprocal right of appellant, and to avoid a collision, and while so driving, the law guaranteed him protection against such a negligent operation by appellant of the tracks as would inevitably lead to his injury. *N. C. S. R. R. Co. v. Zeiger*, 78 Ill. App. 463.

Whether, being in the tracks, he exercised ordinary care in an attempt to drive off and avoid being struck by the approaching car after he knew, or had reason to know it was coming, or, in other words, was in the exercise of ordinary care, under the circumstances of the situation, for his own safety, was a question of fact for the jury.

The theory of the appellant, at the trial and here, is that appellee was at first driving in the parallel track, and upon the approach of the car suddenly turned out of that track into and upon the one along which the car was moving, and that this was done so suddenly and unexpectedly that the motorman was unable to prevent the collision, although he made every effort to do so.

The evidence in support of such theory, and that relied upon in support of appellee's theory that he was driving, from the first, in the tracks upon which he was struck, is absolutely conflicting and irreconcilable. In numbers, and perhaps in opportunities for seeing, the preponderance seems to be with the appellant, but mere preponderance in such respects is not enough to justify the reversal of a judgment.

Numerous other elements that are not visible to us were before the jury and trial judge, from which to determine where the truth lay, and their determination in such respect must be final, where, as here, we can not say they were clearly wrong.

The declaration alleges that "By means of the premises plaintiff was then and there severely and dangerously cut, bruised, wounded and injured, both internally and externally. And plaintiff's back and spine and brain were

thereby, then and there severely and dangerously and permanently injured, and divers bones of his body, arms and limbs were then and there and thereby fractured and broken, and plaintiff was otherwise severely, dangerously and permanently injured both internally and externally. That on account of said injuries caused as aforesaid, plaintiff became sick, sore, lame, disordered and injured, and so remained for a long space of time, during which said time he suffered great bodily pain and mental anguish, and still is languishing and intensely suffering in body and in mind, and in future will continue to suffer from the effect of said injuries for the rest of his natural life."

It is insisted by appellant that the declaration is not, in such respects, sufficient to permit, as was done, evidence of injury to the eyes of appellee, in the particular that atrophy of the optic nerve and a loss of two-thirds the power of sight, had ensued as a consequence of the accident. And it is argued that evidence of such injury is evidence of special damage which needs to be specifically set up in the declaration in order that proof thereof may be admitted. Chitty on Pleading (Vol. 1, star page 395, Ninth Am. Ed.), says:

"Damages are either general or special. General damages are such as the law implies or presumes to have accrued from the wrong complained of. Special damages are such as really took place and are not implied by law, and are either superadded to general damages arising from an act injurious in itself, * * * or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences."

The reason or ground for requiring particularity in the statement of special damages, or such as are not implied by law, in order to entitle the plaintiff to give evidence thereof seems to be to avoid surprise to the defendant. *Olmstead v. Burke*, 25 Ill. 86.

There is an extensive review of authority in this State, in *C. & E. R. R. Co. v. Meech*, 163 Ill 305, as to when proof of loss of profits or earnings may, and when it may not, be made under a general averment of plaintiff having been hindered and prevented from attending to and transacting

his ordinary business and affairs, as the immediate result of injuries received, and the rule there announced, as deducible from the cases reviewed, was restated in *Chicago City Railway Co. v. Anderson*, 80 Ill. App. 71. It has also been lately applied by the Supreme Court in *N. C. St. R. R. Co. v. Brown*, 178 Ill. 187.

We apprehend the principle is the same in this case. Here was the general averment of bodily injuries suffered by appellee, already quoted, and we think it was all that was required to entitle the appellee to show the injury to a particular part of his body, to wit, his optic nerve. We fail to comprehend why an injury to the nerve of his eyes should be required to be specially set forth in the declaration with more particularity than the injury to other nerves which caused the persistent vomiting that appellee suffered, concerning which complaint is not made.

It seems to be plain enough that such injuries to particular parts of the body do not require to be specially set forth in the declaration, but that evidence supporting them may be shown as natural results following upon or flowing from the general injury set forth.

Tyson v. Booth, 100 Mass. 258, was an action of tort for shooting the plaintiff. The evidence tended to show that one of the shots received by the plaintiff lodged upon or near the optic nerve of his right eye, ultimately destroying its power of sight, and that other shots lodged in other parts of his body, and that shot so lodged as some of them were, and pressing upon a nerve, might so affect the nervous system as to produce convulsions or fits, such as was shown the plaintiff suffered from. And it was held that without alleging special damages in his declaration the plaintiff might prove that he became subject to fits as a result of the assault. It may be properly added, that the statutes of Massachusetts have not changed the common law rule, that under a general allegation of damage a recovery may be had for all damages which are the natural or necessary consequences of the cause of action set forth in the declaration; and that it is only when special or peculiar damages are

claimed that it is necessary to aver them specifically. *Pren-tiss v. Barnes*, 6 Allen, 410.

Appellee not having seen fit to furnish any aid to us upon this point, we will not pursue it further, although it is quite likely that more direct authority upon it may exist in this State than we have been able in our hurried examination to place hand upon.

Appellee's seventh instruction was in part as follows:

"If you find for plaintiff you will be required to determine the amount of his damages. In determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to, and they should, take into consideration all the facts and circumstances in evidence before them; the nature and extent of plaintiff's physical injuries, if any, testified about in this case, so far as shown by the evidence; his suffering in body and in mind, if any, resulting from such injuries, and such future suffering and loss of health, if any, as the jury may believe from the evidence before them in this case, he will sustain by reason of such injuries."

The part of the instruction quoted is almost identical with one that was approved in *H. & St. J. R. R. Co. v. Martin*, 111 Ill., on page 232, and, again, in *Chicago City Ry. Co. v. Taylor*, 170 Ill., on page 57, and consequently it is not subject to the criticism urged against it, concerning mental pain.

The modification by the court of appellant's twenty-eighth instruction was rendered necessary because the instruction as tendered, assumed as a fact, either conceded or conclusively proved, that appellee was run into when attempting to cross the tracks in face of the approaching car. We have already said that whether appellee was attempting to cross the tracks in face of the moving car, or was driving along the track and when run into was attempting to get off, constituted a vital point in the different theories of the parties upon which the case was tried.

As to the instructions asked by appellant which were refused by the court, we must stand content with saying we discover no injurious error in regard to their refusal, and will not go into a consideration of them in detail.

We are not without suspicions that the appellee is not so permanently injured as he claims to be, and that the damages awarded are greater than they ought to be.

From the fact, however, that appellant's counsel voluntarily waived their right to argue the case to the jury, the inference is, they thought at the trial that but little could be said in mitigation of damages, if, under the instructions, (more than twenty for appellant), which were fully as favorable as the appellant was entitled to, the appellee was entitled to recover at all.

And, for anything that has been pointed out to us, or that is discoverable by us in this stage of the case, we know of no rule of law that will permit us to say the jury and trial judge erred in the amount awarded.

The conduct and remarks of counsel for appellee during the trial (not in closing argument), are urged upon us as a reason for reversing the judgment, but no ruling of the court was had and exception taken to the most objectionable matters.

There was a good deal of offensive horse-play indulged in in the presence of the jury, and some remarks to the court were made over his refusal, temporarily, to admit evidence, that might properly be called outrageous, if we felt that the able-bodied trial judge needed our protection in such respects, but such are not available as legal error.

We see no reversible error in the record, and therefore affirm the judgment. Affirmed.

MR. JUSTICE HORTON, dissenting.

I can not concur in the above opinion. The object and purpose of pleading is to clearly settle and present a definite issue. To this end a declaration must state the cause of action with such definiteness that the defendant may be thereby advised as to what the plaintiff claims.

Plaintiff charges in the declaration that he was dangerously cut, bruised, wounded and injured, internally and externally; that his back, spine and brain were injured; that divers bones of his body, arms and limbs were frac-

tured and broken; and that he was otherwise severely, dangerously and permanently injured, both internally and externally; and that as a result, he became sick, sore, lame, disordered and injured, and suffered great bodily pain and mental anguish, and is still suffering intensely in body and mind and will the rest of his natural life. There is no averment as to any special injury.

Upon the trial appellee was permitted to prove, under this declaration, and against the objection of defendant, that after the injury complained of there was a tendency to atrophy of the optic nerve, and that his eyesight was impaired.

The atrophy complained of is a "wasting away of the optic nerve owing to defective nutrition." That is not a natural and necessary result of the act complained of. Indeed, it may be correctly stated that it is neither a usual, natural or necessary result of such act. And the declaration makes no charge that as a result of the injury complained of the optic nerve or the power of sight was in any manner affected. Not only is there no such averment in the declaration, but there is no proof that the optic nerve itself was injured. The wasting away was not the result of any injury to the optic nerve. That was caused by defective nutrition. What the cause of the defective nutrition was, I can not say from the proofs. But it seems to me to be conclusive, that, as the optic nerve was not itself hurt at the time of the injury complained of, that atrophy, if it resulted from such injury, was a special injury which must be specially pleaded.

In *Olmstead v. Burke*, 25 Ill. 86, which was an action of covenant, it is held, "general damages are such as the law implies, and presumes to have accrued, from the wrong complained of. * * * It is a rule of pleading, that whenever the damages sustained have not *necessarily* accrued from the act complained of, and consequently are not implied by law, then, in order to prevent surprise on the defendant, the plaintiff must state the particular damage he has sustained, or he will not be permitted to give evidence of it."

In *City of Chicago v. Crooker*, 2 Brad. (Ill. App.) 279, 283, which was an action for personal injuries, the same rule is stated in the same language. *Adams v. Gardner*, 78 Ill. 568, was an action to recover damages for injury to personal property. There (p. 570) the same rule is stated in the same language. *Miles v. Weston*, 60 Ill. 361, was an action of trespass to the person. The same rule is there again stated (p. 364) in language quoted from 1 Chit. Pl. 397. *Myer & Sons Co. v. Davies*, 17 Ill. App. 228, is an action to recover damages for the violation of a building contract. There the same rule is again announced, though not in the same language thus (p. 230):

“The elementary rule is this: But where the damages, though the natural consequences of the act complained of, are not the necessary result of it, they are termed special damages, which the law does not imply, and therefore, in order to prevent a surprise upon the defendant, they must be particularly specified in the declaration, or the plaintiff will not be permitted to give evidence of them on the trial. 2 Greenleaf on Ev., Sec. 254; *Teagarden v. Hetfield*, 11 Ind. 522.”

To the same effect are: *Chicago W. D. Ry. Co. v. Klauber*, 9 Ill. App. 613, 620; *Furlong v. Palleys*, 30 Me. 493; 1 *Sutherland on Damages*, 763, and a large number of cases there cited.

The case of *C. & E. R. R. Co. v. Meech*, 163 Ill. 305, is not in conflict with the rule announced in the cases above cited. In that case the special damages are averred in the declaration, as hereinafter set forth. The question before the court in that case was not whether it is necessary that special damages must be particularly specified in the declaration, but whether the averments in the declaration in that case specified such special damages with such particularity as to entitle the plaintiff to make proof of same. That special damages must be specially pleaded seems to have been accepted by the court and all the parties to that case as being the correct rule.

The *Meech* case was heard in this court, and is reported in 59 Ill. App. 69. It is there stated (p. 72) that “The declaration in the case contained the usual averment as to

damages, but no allegation of special damages." This statement, as it seems to me, is incorrect. An examination of the files of this court in that case shows that in the first count of the declaration, after the usual averments as to physical injuries, it is charged that the plaintiff "has been prevented from attending to his usual business and avocation and earning and receiving large emoluments, which he otherwise would have earned and received, and will hereafter be prevented from attending to his usual business avocation and earning and receiving said emoluments." In the second count plaintiff's allegations as to damages are the same as in the first count.

In an additional count, after setting forth in the usual manner the physical injuries suffered by plaintiff, and stating his expenditures for medicine, nurses, etc., it is stated that "as the immediate result of said injuries plaintiff has heretofore been hindered and prevented, and will hereafter be hindered and prevented from attending to and transacting his affairs and business, and plaintiff has heretofore been and will hereafter be deprived of large gains and profits which he might otherwise, and would have acquired in said business."

Clearly, these are averments of special damages. Under them plaintiff was allowed to testify as to what he made per year in his ordinary business before he was injured, and how much thereafter. Had there been no averment of special damages, such testimony would not have been permissible. They were not the natural and necessary result of the injury. In the Supreme Court, the question under consideration was whether this averment of special damages was sufficiently definite to admit testimony as to plaintiff's loss by reason of being unable to attend to his usual business as a painter. The question was not as to whether such loss must be specially averred, but whether the special averment thereof was sufficiently definite to admit proof of such loss. No case is cited in which it has been held that testimony may be properly admitted and a recovery sustained for loss of business where there is no specific averment of any such loss. As stated by the Supreme Court in the *Meech* case,

ordinarily there need be "no allegations of special damages other than such as are contained in the declaration" in that case. That is a clear recognition of the fact that that declaration contained an averment of special damages. No "other" averment of special damages is necessary beyond this general one of inability to work at plaintiff's ordinary and usual employment or business.

The Supreme Court had just referred to the case of *City of Chicago v. O'Brennan*, 65 Ill. 160. In that case there was an averment that the plaintiff, "as a lawyer, lecturer and journalist * * * was incapacitated from attending to his business," but does not aver any loss on that account. Plaintiff in that case was permitted to give in evidence upon the trial the fact of particular engagements to lecture in Virginia and his estimate of the loss sustained by reason of his inability to meet such engagements. This was held to be erroneous. The discussion of that case and the cases there cited, presents pretty clearly the distinction between cases where general allegations of special damages are sufficient, and those cases where the facts upon which special damages are based must be set out in the declaration.

There is in the declaration in the case at bar no reference whatever to any injury to the optic nerve, nor even a general averment of any injury in any manner affecting the nerves of plaintiff. I can not see how any person, from reading said declaration, could gain the slightest idea that plaintiff was injured by the "wasting away of the optic nerve owing to defective nutrition."

There is here no attempt to show that atrophy of the optic nerve was "the natural consequence of the act complained of." It is certain that such atrophy is "not the necessary result" of such act. It is almost, if not quite, unknown as a result of a physical injury. In *Myer & Sons Co. v. Davies*, *ante* (17 Ill. App. 228), it is held that unless the damages are the natural and necessary result of the act complained of, "they are termed special damages * * * which must be particularly specified in the declaration or the plaintiff will not be permitted to give evidence of them on the trial." If the declaration in the case at bar is suf-

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sufficient to allow proof of such a condition of defendant, then the alleged object of a declaration, *i. e.*, to so advise the defendant of plaintiff's claim as to prevent surprise, is a delusion and a snare. If the averments of this declaration are sufficient to justify proof of atrophy of the optic nerve, then, as it seems to me, the rule that special damages must be specially averred is no longer to be recognized. All that will hereafter be necessary in a declaration of this kind is to say that the plaintiff was "physically injured."

I concur with the majority of the court in the suspicion that the appellee is not injured to the extent claimed. I also concur in the view of the majority that the conduct of counsel for appellee "might properly be called outrageous." I am, however, of opinion that such suspicion would not have been so well founded if the testimony as to atrophy had not been improperly admitted.

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Railway Passenger and Freight Conductors' Mutual Aid and Benefit Association v. Anna Leonard.

1. **BENEFICIARY ASSOCIATIONS—Self-Executing By-Laws.**—A by-law of a beneficiary association providing that all members of the association neglecting or refusing to pay any assessments for the period of thirty days from the date of such assessments, shall cease to be members, is self-executing.

2. **SAME—Notice of Assessments—Where the Constitution Requires None.**—Where the constitution and by-laws are silent as to notice, and actual notice is necessary of an assessment, it is the duty of the association to prove that the deceased failed to pay the amount of the assessments for the period of thirty days from the date thereof, and this requires proof that the deceased actually received notice, and failed to pay within thirty days from the date of such receipt.

3. **SAME—Evidence of the Receipt of Notices—Custom.**—Evidence of the secretary of a beneficiary association of the custom of officers of the association in making out notices of assessments and mailing them to members, raises a presumption that a deceased member received his notice and is sufficient to make out a *prima facie* case, so as to throw the burden of showing the contrary on the adverse party.

4. **SAME—Presumptions Arising from a Refusal to Pay Assessments.**—A refusal to pay assessments, of which a deceased member had knowl-

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edge, raises a presumption that such deceased member intended to abandon his membership in the association.

5. *WAIVER—Of Defects in a Notice.*—Where a member of a beneficiary association receives notice of an assessment and neglects to pay or communicate with the association in regard to it, such conduct is in this case to be a waiver of technical defects in the notice.

6. *SAME—By Intention to Withdraw.*—An intention to withdraw from the association can be shown by conduct as well as by words; and when such intention appears, it must be construed as a waiver of any informality in the notice.

7. *NOTICE—When One is Sufficient.*—An association is not bound to serve a new and technically perfect notice in order to get off of its roll a member who signifies his intention not to pay any more assessments and to abandon his membership.

Bill to Compel a Beneficiary Association to Levy an Assessment.
—Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Hearing and decree for complainant; appeal by defendant. Heard in the Branch Appellate Court at the March term, 1899. Reversed. Opinion filed April 11, 1899.

PECK, MILLER & STARR, attorneys for appellant.

Complainant's decedent was not a member of the association at the time of his death, therefore complainant can not recover. Hansen v. Supreme Lodge of Knights of Honor, 40 Ill. App. 216, 140 Ill. 301; Royal Templars of Temperance v. Curd, 111 Ill. 289; Ill. Masons' Benevolent Society v. Baldwin, 86 Ill. 479; Van Frank v. U. S. Ben. Ass'n, 158 Ill. 560, 56 Ill. App. 203; Yoe v. Howard Mut. Benevolent Ass'n, 63 Md. 86; Borgraefe v. Knights of Honor, 22 Mo. App. 127; Madeira v. Merchants' Exchange, 16 Fed. Rep. 749; Hawkshaw v. Knights of Honor, 29 Fed. Rep. 770; Brown v. Grd. Council N. W. Ladies of Honor (Iowa), 46 N. W. Rep. 1086; Crawford County Mutual Ins. Co. v. Cochran, 88 Pa. St. 230; Lycoming Ins. Co. v. Rought, 97 Pa. St. 415; Fletcher v. Atlantic Mutual Ins. Co., 33 N. H. 9; Lyon v. Supreme Assembly Royal Society of Good Fellows (Mass.), 26 N. E. Rep. 236.

WILLIAM W. CASE, attorney for appellee.

The burden was upon appellant to establish by clear proof that Leonard's membership was forfeited before his

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death. Independent Order Foresters v. Zak, 136 Ill. 185; N. W. Traveling Men's Ass'n v. Schauss, 148 Ill. 304; Railway Conductors' Ass'n v. Loomis, 43 Ill. App. 599; Independent Order Foresters v. Edelstein, 70 Ill. App. 95; Grand Lodge v. Bagley, 164 Ill. 340.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

This is a bill by appellee, the widow of Walter T. Leonard, in which she seeks to compel the appellant association to levy an assessment upon its members in order to pay the amount which is claimed to be due her upon her deceased husband's certificate of membership. The association denies liability upon the ground that Leonard had ceased to be a member before his death, by non-payment of assessments. It is conceded that he never paid the two assessments in question, nor any subsequent assessments made during his lifetime. But appellee's contention is, that the non-payment did not terminate the membership, first, because the two assessments in question were illegally levied; second, because the deceased did not receive legal notice of them; and third, because the association had estopped itself from insisting upon forfeiture by having uniformly accepted from him former assessments after the time for payment had expired, and after he had become delinquent for non-payment.

The assessments in question were illegally levied, it is said, because there was then money enough in the treasury to pay the claims for which such assessments were made. This contention is based, in part, upon the following provision in the constitution of the association: "And should the money in the treasury of the association at any time reach the sum of twenty-five hundred dollars in excess of the amounts required from time to time for general purposes, the same shall be appropriated to the payment of the assessments then due, and the members shall be exempt from the payment of said assessments."

There is testimony tending to show that \$3,000 was in

the treasury at the time in question, held to meet a claim which the association was then contesting in the courts, and which it was ultimately compelled to pay. Ry. Conductors' Ass'n v. Robinson, 147 Ill. 138. That this claim was a valid and subsisting liability, has been determined by the decision of the court of last resort. That it was strictly within the spirit and meaning if not the exact letter of the constitutional provision, to appropriate so much of this sum as was necessary for the payment of such claim, and of the assessments due for the purpose of meeting it, is not, we think, open to question. Deducting the amount thus due and held to await the result of that litigation, the balance of money in the treasury did not "reach the sum of \$2,500 in excess of the amounts required for general purposes." It was, at least, not more than \$500 all told. At the time this money had been thus set aside for payment of the Robinson claim, judgment had already been rendered against the association therefor. An appeal from such judgment was pending. The appropriation was made for payment of the judgment, provided it should be affirmed. By the constitution, all moneys realized from an assessment over and above the \$2,500 to be paid to a member or his heirs on account of death or disability "shall be paid into the treasury of the association for the general purposes of its business." Says counsel for appellee, "The 'general purposes of its business' are the payment of benefits upon the death or disability of members. The association has no other general purpose." The appropriation for the Robinson claim was for such general purpose. It is only the excess over the amounts required for general purposes which can be appropriated to pay new assessments.

The appropriation to meet the Robinson claim having been duly made, that money was no longer available for the payment of new assessments. There was, then, not enough money in the treasury subject to appropriation to the payment of assessments then becoming due to exempt members therefrom, and no illegality or invalidity in the assessments in controversy.

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Appellee further contends that the deceased was never legally notified of the assessments for non-payment of which the association treated his membership as having terminated before his death.

It is provided in the by-laws, "Any and all members of this association neglecting or refusing to pay any assessments for the period of thirty days from the date of such assessments *shall cease to be members.*"

Such provision has been several times held to be self-executing. Ry. Conductors' Ass'n v. Loomis, 43 Ill. App. 599; Hansen v. Supreme Lodge, 40 Ill. App. 216 and 140 Ill. 306.

The constitution and by-laws are silent as to notice, and actual notice was necessary. It is the duty of the association to prove that the deceased failed to pay the amount of the assessments "for the period of thirty days from the date" thereof, and this requires proof that the deceased actually received notice thereof, and failed to pay within thirty days from the date of such receipt. N. W. T. M. Ass'n v. Schauss, 148 Ill. 304; Ry. Conductors' Ass'n v. Loomis, 43 Ill. App. 599; U. S. M. A. Ass'n v. Mueller, 151 Ill. 254.

That Leonard did receive the usual notice, is not seriously denied. The evidence tends to show that he had been and was acting as local secretary, and as such it had been his duty, upon receipt of blank notices from the grand secretary, to fill them out and send them to those individual members whom he, as such local secretary, directly represented. He is shown to have had the notices of the assessments payable April 1st. He turned them over to a successor of his own voluntary selection as local secretary on or before March 10th.

It is urged, however, by appellee, that there is no proof of the time when they were mailed to him, and no proof of the date when he received them.

It is undisputed that the deceased never paid any assessments after he received said notices. The notice of March 1st required him to pay assessments 265 and 266 on or

before April 1st. If there is no proof that he received it thirty days before the latter date, appellee contends that the notice was invalid, because it required him to pay the assessments before they were due; and if he did not receive the notice before March 10th, it required him to pay within twenty-two days, or thereabouts, whereas he was by the by-laws entitled to thirty days from its receipt.

The clerk who sent the March notices testifies that he filled out those for Leonard; that he knows he wrote them, although he can not say that he recollects "that particular notice any more than any other notice for any other month." There is some evidence tending to show that the notices were mailed the first of every month. Such is the testimony of Leonard's successor as local secretary. He says that "these notices are sent to the local secretaries the first day of every month;" and he also testified specifically in reference to assessment 268, the notice for which is dated April 1st, that he received it "about the 2d of April—1st or 2d, somewhere around there." This testimony, while not directly proving the mailing of the notice to Leonard on the first of the month, tends to show that such was the custom, and when taken with the date of the notice and the fact that it was in Leonard's possession shortly after, raises a considerable presumption that the notice of March 1st was mailed on that day, and that if so mailed, it reached the deceased as soon as the next day, March 2d. This would have allowed thirty days time in which to make payment April 1st, and obviated the objection to the validity of the notice. We think it sufficient to make out a *prima facie* case in this regard.

The point is made that the association has estopped itself from treating the membership as forfeited or as having ceased, because it had been a uniform custom, known to the deceased, to receive payment from members after they were formally deemed delinquent. There might be some force in this, if true, provided the deceased had ever paid or offered to pay the assessments at all. But he never did.

The ground upon which appellee must recover, if at all,

is that the deceased still retained his membership notwithstanding he never paid or offered to pay any subsequent assessments after March 1st, and disregarded two notices, showing that payments were due from him upon four such assessments; and for the reason that said March notice is invalid because it contains the words, "remittance must be made on or before April 1, 1893," and may have been received less than thirty days before that date.

As we have said, we think the evidence, though not conclusive, establishes *prima facie*, that the deceased received the notices as early as March 2d, so as to throw the burden of showing the contrary on appellee.

But the undisputed facts are that deceased turned over his local secretaryship on or before March 10th, having made his last remittance as such secretary March 6th; that he went away, stating to his successor that he did not know what his address would be and leaving none; and that during the remaining four months of his life, he never communicated with the association or its officers in any way. Appellant was thus deprived of any definite method of communicating with him, and its officers were, we think, justified in regarding him as having deliberately chosen to put an end to his membership.

This severance on his part of all relations with the association, and his neglect or refusal to contribute toward its support and to the payment of assessments which he knew had been made for the benefit of the beneficiaries of its deceased members, continued, we think, for such length of time as to make it unreasonable to presume that he did not intend to abandon his membership; and if so, the mere technical defect in the notice ought not to have the effect to compel him to remain, and the association to retain him as a member against his will, in violation of the purposes and objects of the organization. The association can only pay rightful claims for benefit money while its members keep up the payment of their dues and assessments levied for that purpose. To say that a member may decline absolutely to perform those duties of membership without the

performance of which the association must cease to exist, and still hold the association to its obligations to him, while he willfully refuses to comply with his own obligations, and indicates by his conduct an intention to persist in such refusal, would be to violate the letter and spirit of the constitution and by-laws of the organization. The deceased is shown to have received two separate and distinct notices of assessments—those for March and April. He never paid or offered to pay either or any of them, and thereafter neither communicated with or received communications from the association. We think this must be held as a waiver of any technical defect in the notice and that he had ceased to be a member pursuant to the provisions of the by-laws, at the time of his death in July.

It is true that where there has been no waiver, a notice which requires payment at a date less than thirty days from the time of its service upon and receipt by the member, is under regulations like those governing this association, invalid. But the cases which so hold are based upon a state of facts differing from those before us. In *U. S. Mut. Acc. Ass'n v. Mueller*, 151 Ill. 254, no other assessment had been levied subsequent to that, the notice of which was defective, prior to the death of the assured. He had on deposit with the association a part of the money required to meet the assessment. The notice was also invalid because it demanded payment of more than was due, and there was no evidence of intention on the part of the assured to abandon his membership.

In *Ry. Cond. Ass'n v. Loomis*, 43 Ill. App. 599, it is said: "The appellant was unable to prove sufficient notice to Loomis, and is, therefore, without defense upon that point. He was, for aught this record shows, a member in good standing when he died." There was "nothing showing, to any reasonable degree or certainty, that he received" the notice. The case was subsequently reversed by the Supreme Court upon other grounds. (142 Ill. 560.)

In *Life Ins. Co. v. Palmer*, 81 Ill. 88, the assured died before the expiration of thirty days from the date when he received the notice.

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In *Frey v. Wellington Mutual Ins. Co.*, 4 Ontario Appeals, 293, 299, the court says the statute required the time of payment to be stated in the notice, and so impliedly required the named day to be at least thirty days subsequent to the mailing.

The evidence is before us that the deceased received one notice, and doubtless received also the two subsequent notices of the assessments of March 1st and April 1st, which are now in appellee's possession and are produced by her counsel. He paid no attention to them. He was marked as delinquent, April 1st, on the books of the association, and the secretary testifies that the entry to that effect was made about the 7th or 8th of April.

If the notice was defective in any respect, it was in the power of the deceased to waive the defect if he chose to do so. He could withdraw from the association when he saw proper. "He could keep his assessments paid up or not, as he chose." *Hansen v. Supreme Lodge Knights of Honor*, 140 Ill. 301, 306; *Van Frank v. U. S. Ben. Ass'n*, 158 Ill. 560, 566.

In this last cited case there was testimony to the effect that the assured, when notified, said the assessment was getting too heavy for him and he had concluded to drop it. The court says:

"It was in the power of the assured to deprive the beneficiary of any interest, and his declaration that he no longer intended to pay assessments, when shown in connection with the fact that he failed to pay an assessment within the time required, whereby the policy lapsed, was competent evidence."

An intention to withdraw from the association can be shown by conduct as well as by words; and when such intention appears, it must be construed as a waiver of any defect or informality in the notice. We have not been referred to any case which holds that the association is bound to serve a new and technically perfect notice in order to get a member off its roll, who signifies his intention not to pay any more assessments and to abandon his membership. The law requires no such useless procedure.

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In view of what we have said, it is not necessary to consider other errors assigned. We are of opinion that under the evidence before us, the association was justified in treating the assured as having chosen to abandon his membership.

It being apparent that all the material evidence obtainable by either party is in this record, and that no better case can be made upon another hearing, the decree of the Superior Court will be reversed without remanding.

Mr. Justice SHEPARD took no part.

Elizabeth Dorn v. A. Montgomery Ward and George R. Thorne.

1. **DECREES—***Must be Sustained by the Evidence in the Record.*—In order to sustain a decree in chancery, where the allegations of the bill are denied, the evidence must appear somewhere in the record. The court can not presume that any evidence was given in the trial court except what the decree recites, or is otherwise made to appear in the record.

2. **SAME—***A Finding Insufficient to Supply Lacking Evidence.*—A finding by the decree that "all the material allegations in said bill of complaint are proved," is not sufficient to supply the absence of the trust deed from the record in a proceeding to foreclose such deed.

Foreclosure.—Trial in the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Hearing and decree for complainant; appeal by defendant. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded. Opinion filed April 11, 1899.

CHARLES PICKLER, attorney for appellant.

GEORGE B. SHATTUCK, attorney for appellees.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The main question is, may an Appellate Court sustain a decree foreclosing a trust deed, in the nature of a mortgage,

without the trust deed, or a properly identified and proved copy of it, appearing in the record, in a case where, as here, all the allegations of the bill, and the execution and delivery of the trust deed sought to be foreclosed, are specifically denied by the answer, and the decree makes no specific findings in relation to the trust deed, but, in that respect, merely finds that "all the material allegations in said bill of complaint are proved."

The only answer the appellee makes to the point, is that the trust deed is shown upon a specified page of the record.

It is not there, but on the contrary, it is made there to affirmatively appear it never was there; nor is it elsewhere in the record. In the master's report of the evidence taken before him, it is stated that, at a particular stage of the hearing, the complainant's solicitor introduced in evidence a trust deed, partly describing it, as by whom executed, when dated, the consideration, to whom made, the description of premises, the promissory notes to secure which the trust deed was given, and the statement that they were given for part of the purchase money for the mortgaged premises, the date of filing the trust deed for record and the place of recording the same, and that he asked that the trust deed so introduced in evidence might be marked as an exhibit. Nothing else of the trust deed is shown.

Looking for the exhibit in its appropriate place, we find it is there referred to as "a trust deed securing the foregoing notes, a copy of the same being attached to the bill of complaint filed in the above entitled cause," but nothing more.

No copy is attached to the bill, and except for such mistaken statement by the master, it in no manner appears to have ever been so attached. And, as already said, neither the trust deed nor anything purporting to be a copy of it, is elsewhere in the record.

The notes described in the bill and in the master's report, appear on their face to be not yet due by their terms, but still the master makes a finding, that because of a proved default in the payment of certain interest on the notes, the

holders of the notes (the complainants), have in pursuance of the power conferred upon them by the trust deed, declared the entire amount secured by the notes and trust deed due and payable.

The trust deed not being in the record, and nothing appearing to supply the want of it, the master's finding in the respect mentioned was without support.

We have recited all that the proof shows of anything material concerning the trust deed.

The findings of the master follow the allegations of the bill, but as far as the record before us shows, the proof does not sustain either the allegations or the findings. See *Wheeler v. Foster* (No. 7781, this term).

The decree might, perhaps, have saved the case, but there is no sufficient finding there. A finding by the decree that "all the material allegations in said bill of complaint are proved," is all that the decree contains in any way material to the question, and that manifestly, it is not sufficient to supply the place of the lacking evidence. Had the decree found the material specific facts evidenced by the trust deed, the absence of the trust deed from the record would have been harmless.

It is absolutely essential in order to sustain a decree in chancery, where the allegations of the bill are denied, that the facts appear somewhere in the record, and we can not presume any evidence was given in the court below except that the decree recites, or is otherwise made to appear. *Farwell v. Patterson*, 76 Ill. App. 601.

In the case just cited, there may also be found a reiteration of the well understood rule, in chancery, that the party who would sustain a decree must preserve, in some appropriate manner, the evidence upon which it is based. There is no presumption, in chancery, that evidence not appearing in the record was heard in support of a decree in favor of a complaint.

The essential foundation for this foreclosure suit is the trust deed. At the hearing before the master, the appellant, by her counsel, objected particularly and with techni-

cal accuracy to the introduction of the trust deed and to the proof of its execution, and without the evidence before us upon which the master's finding was based, we are at entire loss to see how we can hold the decree to be sustained and justified by the evidence.

What we have said about the absence of the trust deed from the record, applies with much force to purported evidence of the condemnation proceeding relied upon by appellees with reference to certain of the premises alleged to be covered by said trust deed. But the decree having to be reversed and the cause remanded for the reasons stated, it may be presumed that if the record comes before us again, it will be presented in a form that will permit us to review the merits of the case. Reversed and remanded.

Minna Katzmann v. The Mosler Safe Company.

1. **PRESUMPTIONS**—*In the Absence of a Bill of Exceptions.*—Where an appeal is taken from an order of a Circuit Court dismissing a suit appealed from a justice of the peace and no bill of exceptions is filed, the Appellate Court will presume that if filed it would have shown affirmatively the appearance of the appellant, and consequent jurisdiction of the court to dismiss the suit.

2. **CIRCUIT COURT**—*Presumptions as to its Judgments.*—The Circuit Court is a superior court of general jurisdiction. Its judgments are presumed regular and valid when within the general scope of its power, until the contrary is affirmatively made to appear.

Assumpsit.—Trial in the Circuit Court of Cook County, on appeal from a justice of the peace; the Hon. GEORGE W. BROWN, Judge, presiding. Suit dismissed on call, for want of prosecution; appeal by plaintiff. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed April 11, 1899.

CHARLES PICKLER, attorney for appellant.

PADEN & GRIDLEY, attorneys for appellee.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

Appellant having recovered a judgment before a justice

of the peace against appellee, the latter perfected its appeal to the Circuit Court. The case having been reached on the regular call, the suit was dismissed on motion of the defendant's attorney. The next day the appearance of the plaintiff was entered, and thereafter she moved to vacate the order of dismissal, which motion the court denied, and she thereupon perfected this appeal.

No summons appears from the record to have issued out of the Circuit Court or to have been served upon appellant after the appeal from the justice had been perfected, and the record fails to show affirmatively any appearance by her in that court prior to the order complained of dismissing her suit for want of prosecution. It is urged that the Circuit Court had, therefore, no jurisdiction to dismiss her suit.

It is conceded by appellee that "where an appeal from a judgment of a justice of the peace has been perfected by the filing of an appeal bond in the upper court, and no summons has been issued to bring the appellee into court, and no appearance of any kind has been made by him, the court has no jurisdiction over him, and the dismissal of his suit under such circumstances would be error."

The order denying appellant's motion to vacate the order of dismissal, allows an appeal to this court upon her filing an appeal bond, together with her bill of exceptions, within thirty days. No bill of exceptions was filed. It is contended by appellee that in the absence of such bill of exceptions, we must presume it would have shown affirmatively the appearance of the appellant, and consequent jurisdiction of the Circuit Court to dismiss the suit.

The Circuit Court is a superior court of general jurisdiction. Its judgments are presumed regular and valid when within the general scope of its power, until the contrary is affirmatively made to appear. The mere absence from the record of any evidence of summons or appearance, does not overcome this presumption. Our Supreme Court early adopted the rule that nothing shall be intended to be out of the jurisdiction of a Superior Court but that which specially appears to be so. *Kenney v. Greer*, 13 Ill. 432, 449; *Freeman on Judgments*, Sec. 132.

There are no pleadings in appeals from a justice of the peace, and the rule prevails, there being no bill of exceptions, that the finding can not be inquired into by this court, and jurisdiction must be presumed. *The Tug Montauk v. Walker & Co.*, 47 Ill. 335, 341.

The judgment of the Circuit Court is affirmed.

Albert Beckman v. Henry Menge.

1. **GIST OF THE ACTION**—*Defined*.—The gist of an action is defined to be the cause for which the action will lie; the ground or foundation of a suit, without which it can not be maintainable; the essential ground or object of a suit, without which it is not a cause of action.

2. **SAME**—*Whether Malice Is—How Determined*.—Whether malice is the gist of the action must be determined by an inspection of the record.

3. **MALICIOUS PROSECUTION**—*Malice the Gist of the Action*.—In an action for malicious prosecution, averment and proof of malice are absolutely essential to the maintenance of the action. Without proof of malice there can be no recovery.

Petition, for a discharge under the "act concerning insolvent debtors." Trial in the County Court of Cook County; the Hon. ORIN N. CARTER, Judge, presiding. Order for discharge entered; appeal by respondent. Heard in this court at the March term, 1899. Reversed and remanded with directions. Opinion filed February 23, 1899. Rehearing denied April 13, 1899.

DENNIS & RIGBY and HARRY L. HANLEY, attorneys for appellant.

Malice was a necessary element of the action and judgment for malicious prosecution in the Superior Court. *Harpham v. Whitney*, 77 Ill. 32, 41, 42; *Neufeld v. Rodeminski*, 144 Ill. 83.

Malice defined. *Bank v. Burkett*, 101 Ill. 391; *Harpham v. Whitney*, 77 Ill. 32; *Kitson v. Farwell*, 132 Ill. 327; *Neufeld v. Rodeminski*, 144 Ill. 83; *Mahler v. Sinsheimer*, 20 Ill. App. 401.

The gist of the action comprehends whatever is indis-

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pensable in law to a right of recovery. Gould, Pleading, 162, Ch. 4, Sec. 12; Bank v. Burkett, 101 Ill. 391; Kitson v. Farwell, 132 Ill. 327; Bac. Abr., Pleas, B. 1, Doct. Pl. 85.

The burden of showing that malice was not the gist of the action in the Superior Court, was on the petitioner (appellee). Mahler v. Sinsheimer, 20 Ill. App. 401, 405; Blatta v. Evans, 57 Ill. App. 311.

Malice was of the gist of the action in the Superior Court. Mahler v. Sinsheimer, 20 Ill. App. 401, 403, 404; In re Murphy, 109 Ill. 31; In re Mullin, 118 Ill. 551.

HARRISON D. PAUL, attorney for appellee, contended that the gist of the action is the one thing without which a recovery could not be had—not two things. Our early legislators, who passed the original insolvent act, understood English and used it grammatically; if they had wished to say “when malice is not of the gist of the action” that would have been the language of the law, instead of “when malice is not the gist of the action,” as expressed in R. S., Chap. 72, Sec. 2.

MR. JUSTICE ADAMS delivered the opinion of the court.

Appellant sued appellee in case for malicious prosecution. The declaration contains two counts, in each of which it is alleged that the defendant (appellee) falsely, maliciously, and without any reasonable or probable cause, by complaint in writing and under oath, charged the plaintiff (appellant) with having obtained money by false pretenses, and falsely and maliciously caused plaintiff to be arrested and imprisoned, etc., and that the defendant did not further prosecute said complaint, but abandoned the same, and the plaintiff was acquitted and discharged, and said prosecution and complaint were wholly ended. The defendant having been duly served with summons, failed to appear, and was defaulted; a jury was called to assess the plaintiff's damages, and assessed the damages at the sum of \$3,500. Judgment was entered on the verdict, and a *ca. sa.* was issued, on which the defendant was arrested, when appellee applied to

the County Court for his discharge under the provisions of the "Act concerning insolvent debtors," and the court, having heard the application, discharged him.

Counsel for plaintiff contend that the discharge was erroneous, because malice was the gist of the action, and by section 2 of the statute, release from arrest and imprisonment or execution against the body, is excluded in cases in which malice is the gist of the action. Whether malice is the gist of the action must be determined by inspection of the record. *Forsyth v. Vehmeyer*, 176 Ill. 359, 366.

The declaration avers malice and want of probable cause.

In *Kitson v. Farwell et al.*, 132 Ill. 327, the court (p. 338) says: "The gist of an action is defined to be the cause for which an action will lie; the ground or foundation of a suit, and without which it would not be maintainable; the essential ground or object of a suit, without which it is not a cause of action."

It is unnecessary to cite authorities in support of the thoroughly established proposition, that in an action for malicious prosecution, averment and proof of malice are absolutely essential to the maintenance of the action. Without proof of malice there can be no recovery. In the present case malice was averred; it was a material averment, and the defendant's default admitted its truth. *Underhill v. Kirkpatrick*, 26 Ill. 84; *Madison Co. v. Smith*, 95 Ib. 328.

Even on the hypothesis that proof of the non-existence of malice was admissible on appellee's application to the County Court for release from arrest, appellee must fail, because the only evidence introduced by him, aside from the record in the common law case, was that he had no property in excess of that exempted by law except worthless accounts, which evidence did not, in the least, tend to disprove malice in causing the arrest of appellant. Appellee's counsel makes some objections to the bill of exceptions, but we can perceive no error in that regard. He also contends that the appeal should be to the Circuit Court and not to this court. It was held in *Huntington v. Metzger*, 51 Ill. App. 222, in a similar case, that the appeal was

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properly taken to this court, and the same has been held at the present term, in the Matter of Christian Busse, General Number 7,951, unreported, also a similar case, in which the question is fully discussed.

The judgment of the County Court will be reversed and the cause remanded to that court, with direction to remand appellee to the custody of the sheriff. Reversed and remanded, with direction.

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George F. Case v. Ophelia E. Phillips et al.

1. **EQUITY PRACTICE**—*Findings of the Master Conclusive*.—The finding of the master in chancery upon the question of settlement in this case, is conclusive.

Creditor's Bill.—Trial in the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Hearing and decree for defendants; appeal by complainants. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed April 11, 1899.

NEWMAN, NORTHUP & LEVINSON, attorneys for appellant.

M. B. & F. S. LOOMIS, attorneys for appellees.

MR. JUSTICE SHEPARD delivered the opinion of the court.

A bill, in the nature of a creditor's bill, was filed by appellant to reach certain real estate in Cook county, held by the appellee, Mrs. Phillips, as a gift from her husband, James W. Phillips, by conveyance made in his lifetime, subsequent to his becoming indebted, as claimed, to appellant.

The main controversy is confined to the single question of whether the alleged claim of appellant has been paid and satisfied.

The master's report recites that by agreement of counsel the cause was submitted to him upon that sole question, and his conclusion was that appellant's claim had been paid and satisfied in full, and decree went accordingly.

Appellant's claim was for a balance alleged to be due to him from the said James W. Phillips in the matter of the sale by him for the appellant, of six certain second-hand carriages. All the carriages were shipped by appellant from Detroit, Michigan, to Chicago, three of them being shipped to Phillips, and three of them to the James Cunningham Son & Company, a corporation, for whom Phillips was manager. There is no doubt but the carriages were sold by Phillips, either individually or as manager of said corporation, for the total sum of \$1,750, nor but that \$834 of the proceeds were properly accounted for to the appellant by Phillips. So much of the transaction occurred in 1888 to 1890.

As against the claim by appellant for the balance, appellees' defense was that the carriages came to the hands of said Phillips as manager of said corporation, and that it has been fully paid by the corporation.

Phillips left the employment of the Cunningham Company about 1890, and in 1892 removed from Chicago to New Jersey, where he died, in December, 1893.

In a letter dated February 14, 1893, from appellant to Phillips, the appellant refers to his claim as "the unsettled account with the Chicago house, which you had charge of," and adds:

"I don't think you have any reason to not settle this matter as it has been so long and the house has account against me and would like to get the thing settled up and I have called on them for settlement and shall hold the house for a settlement."

Again, it was shown by the appellee that in an action brought by the said Cunningham Company against the appellant, in the Circuit Court of Wayne County, Michigan, in May, 1893, to recover upon an account for a carriage and certain carriage supplies, amounting, as appears by the bill of particulars, to \$715.12, the appellant interposed a set-off against the claim sued for, setting forth in the bill of particulars of such set-off, a claim against the said Cunningham company for the same carriages here in controversy, and the record of that suit shows a stipulation filed therein,

Case v. Phillips.

dated April 2, 1894, between the counsel of the respective parties, that the said cause "is settled in full and discontinued without costs to either party." After that was done, and after the death of Phillips, and under date of September 27, 1894, one Charles Strobridge, the then secretary of the Cunningham company, made an affidavit in behalf of that corporation, which affidavit, as appellant's brief concedes, was filed against Phillips' estate in New Jersey, wherein, on oath, he stated as follows:

"That J. W. Phillips, late of Newark, New Jersey, was, at the time of his death, justly, truly and lawfully indebted to the said company in the amount of \$759.84. That the indebtedness arose in the following manner, namely: One George F. Case, of Detroit, Michigan, between May 18, 1888, and February 22, 1889, shipped goods to the said Phillips, as agent for said company, to an amount exceeding said sum, which the said Phillips failed to account for, and for which the said company became liable to the said Case, by reason of the default of the said Phillips. That by reason of the default of said Phillips, as agent of said company, said company was obliged to and did, on April 2, 1894, pay to the said Case the said sum of \$683.84, besides the sum of \$106 paid for legal fees, for which amounts the said Phillips then became indebted to the said company, no part of which has been paid, and all of which is past due, with interest. That there are no offsets or counter claims to the said demand."

From such, and other evidence, the master came to the proper conclusion, that the indebtedness referred to in Strobridge's affidavit, and that involved and settled in the suit in Michigan, between the Cunningham company and appellant, was the same for which this suit was instituted, and that appellant could not maintain this suit.

The objection that the affidavit of Strobridge was incompetent evidence, is not well taken. It was competent as an admission of the Cunningham company, who, though not an actual party to this suit, is identified in interest with the appellant in the subject-matter of the litigation, as clearly enough appears from the evidence in the case, which, however, we will not take space to recapitulate.

Appellee's cross-errors, assigned because of the sustain-

ing, by the court below, of certain of appellant's exceptions to the master's report, bring this question before us, and we think the exceptions should not have been sustained. Standing by itself, the affidavit by Strobridge was, probably, not competent evidence, but taken in connection with the other evidence tending strongly, if not conclusively, to show that the Cunningham company is identified in interest with appellant in the litigation, it was clearly competent as an admission.

The Circuit Court, although rejecting the Strobridge affidavit, held, with the master, that appellant's claim sought to be forced here, was settled and paid in full by the Cunningham company, and, with considerable reason, rightly so held.

But, with that affidavit in the case, there can be no hesitation in holding that the decree of the Circuit Court dismissing the bill for want of equity ought to be affirmed.

This conclusion renders it unnecessary for us to consider whether, or not, the appellees hold the real estate in question subject to the claim of appellant.

The decree of the Circuit Court is affirmed.

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Isaac Hirsch v. The Chicago Carpet Company.

01/12/1899
admitted
Plaintiff

1. GUARANTY—*What is a Sufficient Consideration.*—Any consideration moving from a buyer to the seller contemporaneous with or subsequent to the promise of a guarantor, is sufficient as between the buyer and such guarantor, to support the contract of guaranty.

2. CONSIDERATION—*For a Guaranty.*—A dealer sold goods to a party but refused to deliver them unless payment therefor was secured. Upon the execution and delivery of the guaranty sued upon, he agreed to and did deliver the goods. *Held*, the consideration for the contract of guaranty was sufficient.

Assumpsit, on a contract of guaranty. Trial in the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed April 11, 1899.

Hirsch v. Chicago Carpet Co.

Statement of the Case.—This is an action in assumpsit brought by appellee against appellant and Newton Morganroth to recover the amount due appellee for goods sold to the Tivoli Amusement Company. Appellee had agreed with the Tivoli company to sell to it certain carpeting at prices agreed upon between them, and the Tivoli company had agreed to take and pay for the same in sixty and ninety days after delivery. Appellant was president, and said Morganroth secretary and treasurer of the Tivoli company. After said agreement was made, representatives of appellee informed appellant and said Morganroth that appellee would not deliver the carpeting contracted for unless payment therefor was secured. Thereupon appellant and said Morganroth executed and delivered the guaranty sued upon, and appellee agreed to and did deliver the carpeting. Said guaranty is as follows, viz.:

“CHICAGO, August 3d, 1896.

I hereby guarantee the payment to the Chicago Carpet Company, Limited, of any account contracted by the Tivoli Amusement Company, in supplying carpets or otherwise furnishing the theatre at Nineteenth street and Wabash avenue, this city, and I further guarantee that such account shall be paid promptly in two (2) installments, to wit: Fifty (50) per cent on the sixtieth (60th) day after the work is completed and the balance thirty (30) days later.

NEWTON MORGANROTH, Sec. & Treas.

I. HIRSCH, Pres.”

Verdict and judgment in favor of appellee. Morganroth does not join in this appeal.

NEWMAN, NORTHRUP & LEVINSON, attorneys for appellant, contended that the contract between appellee and Tivoli Amusement Company being closed before appellant signed or agreed to sign the alleged guaranty, appellant can not be held to such guaranty, since no new consideration passed. 1 Brandt on Suretyship and Guaranty (2d edition), Sec. 17; Baylies on Sureties and Guarantors, 56; Dennis v. Piper, 21 Ill. App. 169; Martin v. Stubbings, 20 Ill. App. 381; Harwood v. ^{Er}persted, 20 Ill. 367; Joslyn v. Collinson,

26 Ill. 61; *Armstrong v. C. V. L. & C. Co.*, 48 Pac. Rep. 690; *McFarland v. Heim*, 29 S. W. Rep. 1030; *Ware v. Adams*, 24 Me. 177; *Jones v. Ritter*, 32 Tex. 717.

When a guarantee is put upon a note, at the time of its execution, and so is a part of the original transaction, no new consideration is necessary to support it; but when it is entered into subsequently, it is a new and independent undertaking, and must be supported by a new and independent consideration, and the pleading should conform to this rule of law. *Joslyn v. Collinson*, 26 Ill. 62.

To the same effect also is the rule stated in *Brandt on Suretyship and Guaranty*:

"Where the consideration between the principal and creditor has passed and become executed before the contract of the surety or guarantor is made, and such contract was no part of the inducement to the creation of the original debt, such consideration is not sufficient to sustain such contract." 1 *Brandt on Suretyship & Guaranty* (2d Ed.), p. 20, Sec. 17.

WINSTON & MEAGHER, attorneys for appellee; RALPH MARTIN SHAW, of counsel.

A consideration moving to the principal alone, contemporaneous with or subsequent to the promise of the surety or guarantor, is sufficient. *Brandt on Suretyship*, Second Ed., Sec. 15, and cases there cited.

Where the contract of guaranty is entered into concurrently with the principal obligation, a consideration which supports the principal contract supports the subsidiary one also. *Erie County Savings Bank v. Coit* (N. Y.), 11 N. E. Rep. 54, 56.

MR. JUSTICE HORTON delivered the opinion of the court.

It is contended on behalf of appellant that there was between appellee and the Tivoli company a contract for the sale of the goods in question before a guaranty was signed, that no new contract was made, and that there was, therefore, no consideration for said guaranty. This is substantially the only question in the case.

Hirsch v. Chicago Carpet Co.

The contract between the Tivoli company and appellee was a valid contract, binding upon both the parties thereto. Appellee positively refused to perform on its part unless payment was secured. It was then optional with the Tivoli company to decline to furnish the security demanded, and to sue appellee to recover damages, if any there were, for non-performance of contract. Instead of doing this, the guaranty sued upon was furnished by the Tivoli company, and the goods were delivered by appellee. There is no contest as to the value of the goods thus delivered.

We do not deem it necessary to follow counsel in their argument as to all the various points and "syllògisms" presented in their arguments upon the question of consideration. We are of opinion that there was not such a want of consideration as to defeat the claim of appellee upon said guaranty. *Bishop v. Busse*, 69 Ill. 403; *Cooke v. Murphy*, 70 Ill. 96.

Appellee declined to part with its goods without such guaranty. Appellant and Morganroth were not outside parties having no interest in the matter. They were the principal officers of the Tivoli company.

There is no force in the contention that those men executed the guaranty only as officers of the company, *i e.*, that the company exceeded the guaranty. That is equivalent to saying that the Tivoli company itself guaranteed that it would perform its own contract. Those men were not so foolish as that. But whether they did sign the guaranty as officers of the company, or in their individual capacity, was submitted to the jury upon instructions asked by appellant and we have no inclination to disturb the verdict of the jury.

Again it is argued that appellant's signature to the guaranty contract was obtained by fraud, and is therefore not binding. This question was also submitted to the jury upon an instruction asked by appellant. There is no reason shown why we should disturb the verdict upon that question.

Perceiving no error, the judgment of the Superior Court is affirmed.

**North Chicago St. R. R. Co. v. Ida M. Lehman, formerly
Ida M. Campion.**

1. **DAMAGES**—*Mental Pain, When a Proper Element.*—Mental pain is a proper element of damages to be considered by a jury, when it arises directly out of and is a part of the physical suffering endured as a result of an injury.

2. **PLEADING**—*Averments of "Mental Pain."*—The general averment that "many of the bones of her body were broken," and that she "became sick, sore, lame and disordered," is a sufficient averment to support evidence of particular bones being broken, but is not sufficiently specific as a pleading from which to infer mental pain as a result.

3. **SAME**—*Absence of Averments as to Mental Pain.*—Mental pain can not be taken into account in estimating the compensation to be awarded to an injured person, where neither it, nor anything from which it can be directly inferred, is averred in the declaration. Proof of mental pain with no averment in the declaration to support it does not aid the lack of such an averment.

4. **MENTAL PAIN**—*Not the Result of Physical Pain.*—It is not enough in this case, to say that mental pain is the direct result or concomitant of severe physical pain, and therefore need not be specially averred, for there is no averment that any bodily pain was suffered.

Action for Personal Injuries.—Trial in the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court, at the March term, 1899. Reversed and remanded. Opinion filed April 11, 1899.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

EDWARD J. WALSH, SR., and THOMAS W. PRINDEVILLE, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The appellee sued to recover for personal injuries sustained by her through the alleged negligence of appellant, by its servants, in causing the horse, behind which she was riding in a buggy, to become frightened and run away and cast her to the ground, etc.

The allegations of the declaration concerning her injuries, in addition to the money expended in endeavoring to be cured, and her being prevented from attending to her affairs and business as a school teacher, are, that "many of the bones of her body were broken, and also by means of the premises, she was and became sick, sore, lame and disordered, and so remained for a long space of time, to wit, from thence hitherto."

The declaration contains no specific allegation that she suffered any bodily or mental pain, as the result and because of her injuries.

The second instruction given to the jury at the request of the appellee (plaintiff) was as follows:

"The court instructs the jury that if they find the defendant guilty under the law and the evidence in this case, then in estimating plaintiff's damages you will take into consideration the pain and suffering caused by the injury to the plaintiff in body and mind, if any such appear from the evidence, the loss of time resulting to the plaintiff from said injuries, if any such appears from the evidence, and the extent and nature of the injuries received by the plaintiff, whether permanent or otherwise, if any such appear from the evidence, reasonable expenses incurred by the plaintiff in and about endeavoring to be cured of such injuries, if any such appear from the evidence, and assess such damages as the jury may believe from all the evidence before them in this case, the plaintiff has sustained or will sustain by reason of said injuries."

Appellant insists that the giving of such instruction constituted error, because of the lack of any allegation in the declaration of suffering in mind, and of any evidence in the case tending to establish such mental suffering.

There was evidence that tended to show she suffered severe pain.

Mental pain is undoubtedly a proper element of damage to be considered by a jury, when it arises directly out of and is a part of the physical suffering that it endured as the result of an injury. *C. C. Ry. Co. v. Canevin*, 72 Ill. App. 81; *C. C. Ry. Co. v. Anderson*, 80 Ill. App. 71.

But we know of no authority or principle that admits of

it being taken into account in estimating the compensation to be awarded to an injured person, where neither it, nor anything from which it may be directly inferred, is averred in the declaration—in other words, where the plaintiff does not lay claim to damage on account of it. Proof of it, with no averment to support the proof, does not aid the lack of averment.

It is not enough, in this case, to say that mental pain is the direct result or concomitant of severe physical pain, and therefore need not be specially averred, for there is no averment that any bodily pain was suffered.

The general averment that "many of the bones of her body were broken," and that she "became sick, sore, lame and disordered," was probably all that was required by way of averment, to support evidence of particular bones of her body being broken, but it was not sufficiently specific from which, as a matter of pleading, to infer the arising of mental pain as a result.

Had it been appropriately averred that in consequence of the injury the plaintiff suffered severe pain and anguish of body and mind, or had a specific physical injury been averred, from which severe bodily pain might be inferred, the evidence that tended to show that appellee suffered severe bodily pain, would probably have justified the instruction—because of mental pain being concomitant with severe physical pain, and of the rule that mental pain directly growing out of and through physical suffering may be considered in estimating damages; but without an averment in some of such respects, we should be upholding a looseness in pleading that even modern liberality in that direction has not extended to.

It may be, the verdict being small, the jury did not consider the element of pain, either bodily or mental, but we can not know it. In a close case, the jury should be accurately instructed as to the law involved.

For error in the instruction, the judgment will be reversed and the cause remanded.

Chicago City Ry. Co. v. Estella L. Peacock.

1. **VERDICTS—On Conflicting Evidence—Conclusive.**—Where the evidence is conflicting and irreconcilable, and that produced by the party in whose favor the jury find, when considered alone and independent of the opposing testimony, sustains the verdict, it will not be disturbed, unless it is manifest the jury have mistaken the evidence, or have been governed by passion or prejudice.

Action for Personal Injuries.—Trial in the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded. Opinion filed April 11, 1899.

WM. J. HAYNES and W. J. FERRY, attorneys for appellant.

The verdict of the jury was manifestly against the weight of the evidence, and ought to be set aside. *North Chicago St. Ry. Co. v. Lotz*, 44 Ill. App. 78; *Moore v. Mauk*, 3 Ill. App. 114; *C. & P. Ry. Co. v. Herring*, 57 Ill. 59; *C. & A. R. R. Co. v. Purvines*, 53 Ill. 38; *N. C. St. R. R. Co. v. Fitzgibbons*, 54 Ill. App. 385; *City of Chicago v. Lavelle*, 83 Ill. 482.

CHARLES HUGHES, attorney for appellee; WM. E. HUGHES, of counsel.

The jury is the sole judge of the credibility of witnesses. *DeLand v. Nat. Bank*, 111 Ill. 327; *Singer M. Co. v. Price*, 26 Ill. App. 415; *C. & A. R. R. Co. v. Fisher*, 38 Ill. App. 33, 141 Ill. 614.

The credit to be given to witnesses is given over by law to be settled exclusively by the jury trying the cause. *Chicago H. Cab Co. v. Harelick*, 33 Ill. App. 151; *Anderson v. People*, 34 Ill. App. 87; *Kennedy v. Sullivan*, 34 Ill. App. 55; *Wiggins Ferry Co. v. Higgins*, 72 Ill. 517.

When there is a conflict in the evidence it is for the jury, not the court, to determine which side to believe, and

which witness to believe. *Travers v. Snyder*, 38 Ill. App. 386; *Durant v. Rogers*, 87 Ill. 508.

In an action on the case for negligence, the jury are the sole judges of the fact of negligence. *I. C. R. R. Co. v. Simmons*, 38 Ill. 242; *C. & A. R. R. Co. v. Pondrom*, 51 Ill. 333.

When the evidence is conflicting the verdict must be regarded as settling the controverted facts. *Kightlinger v. Egan*, 75 Ill. 141.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The appellee recovered a verdict and judgment for \$7,187, in a suit for injuries to her person, sustained through the alleged negligence of appellant, by its servants, whereby, when alighting from one of its street cars, she was violently thrown to the ground.

The bill of exceptions shows that in passing upon the motion for a new trial the eminent judge presiding at the trial said:

"If the jury believed the testimony of the plaintiff and her two witnesses they were justified in giving her a verdict. I don't believe them myself. The great preponderance of the evidence is against the verdict—the great preponderance of the testimony of those who were best able to know and entitled to belief; but the courts have sometimes held that if the evidence of the plaintiff uncontradicted is sufficient to support a verdict the court should not disturb it. The law makes the jury, not me, the judge of the credibility of the witnesses. I will let you take it to the Appellate Court. I hope they will grant you a new trial. The motion for a new trial is overruled."

That statement by a judge whose words are rarely misapplied, and whose learning is as great as his judicial impartiality is proverbial, has made us look at the facts of the case and the law that is applicable, with the utmost care.

The controlling inquiry in the case is, had the car stopped, and while the appellee was in the act of stepping off, was it suddenly started, thereby throwing her.

The theory of the defense is, that appellee, without waiting for the car to stop, stepped off while it was yet in motion, and that she was thrown because of her own contributory act.

It would do no good to recapitulate the testimony. It is enough to say that it so manifestly and decidedly preponderates, both in number of witnesses and their respective opportunities for knowing whereof they testify, that it is our duty to so order as that another jury may pass upon the question.

We need not here repeat the cases which are referred to in *Elguth v. Grueszka*, 75 Ill. App. 281, making this course incumbent upon us when the verdict is manifestly opposed to the great weight of evidence.

The case of *Ill. Cent. R. R. Co. v. Ogle*, 92 Ill. 353, also contains a summary of many previous decisions by the Supreme Court bearing upon the subject.

The syllabus of *Chapman v. Burt*, 77 Ill. 337, is there quoted as having been said by the court, as follows:

“Where the evidence is contradictory, conflicting and irreconcilable, and that produced by the party in whose favor the jury find, when considered alone and independent of the opposing testimony, clearly sustains the verdict, it will not be disturbed, unless it is manifest the jury have mistaken the evidence, or have been governed by passion or prejudice.”

We regard that as being a comprehensive rule applicable to this case and as governing it. It is here plainly manifest that the jury either mistook the weight of the evidence or were so prejudiced against the appellant as to be unable to give it a fair and impartial trial.

We regard it as our plain duty to reverse the judgment and remand the cause for another trial.

Q. J. Chott v. Tivoli Amusement Co. for the use of A. W. Thurston.

82	244
88	349
82	244
102	398
82	244
106	250
82	244
s114	178
s114	180

1. **GARNISHMENT—*Claims of Third Persons.***—In garnishment proceedings, where it appears that the goods, chattels, choses in action, credits or effects in the hands of a garnishee are claimed by another person, it is the duty of the court to permit the person so claiming to appear and maintain his right. If he does not voluntarily appear, notice for that purpose should be issued and served on him in such manner as the court directs.

2. **SAME—*Duty of Garnishee to Disclose Claims of Third Persons.***—It is the duty of the garnishee to disclose, in his answer, the interests and claims of all third parties, so far as he has knowledge of the same.

3. **SAME—*Limit of the Recovery of the Judgment Creditor.***—The judgment creditor can only recover for such indebtedness as the judgment debtor could recover from the garnishee in a suit by the former against the latter, and it is incumbent on the judgment creditor to prove that the indebtedness of the garnishee is to the judgment debtor and not to some one else.

4. **SAME—*Assignment of Judgment Debtor to a Third Party.***—When it is disclosed by the answer of the garnishee that the chose in action in controversy has been assigned by the judgment debtor to a third party, it is the duty of the judgment creditor to notify such third party as may be directed by the court.

5. **SAME—*Where the Garnishee has Notice of the Claims of a Third Party.***—If the garnishee has notice or information that a third party claims an interest in the fund or property in controversy, he must, if he would protect himself against such claim, disclose it by his answer, even though he can not, of his own knowledge, swear to the existence of the claim or its precise nature.

6. **SAME—*Where the Answer Discloses Adverse Claim.***—Where the answer of the garnishee discloses parties and interests adverse to the rights of the execution debtor, than whom the garnisheeing creditor has no greater rights, it is the duty of the court, in order to protect the rights of such parties, to see that they are properly brought before the court, so that the rights of all parties in interest may be adjudicated. Until that is done, the cause is not in a condition to be heard, and it is error to force the garnishee to a trial in their absence.

Garnishment.—Trial in the Circuit Court of Cook County; the Hon. HENRY B. WILLIS, Judge, presiding. Verdict and judgment for garnishor. Appeal by garnishee. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed March 16, 1899. Rehearing denied April 13, 1899.

PECK, MILLER & STARR, attorneys for appellant.

Garnishee process is only intended to be allowed when there is no property subject to execution, or when it can not be found by reasonable efforts of the officer and the plaintiff in execution. *Chanute v. Martin*, 25 Ill. 63.

The sworn answer of the garnishee alleged that before the commencement of the garnishment proceedings the Tivoli company had sold and assigned to Morganroth its assets, including the subscription of defendant to the capital stock and all liability thereon, in consideration that Morganroth would pay the debts of the company; and that this was done by the direction or with the consent of the beneficial plaintiff, Thurston. There was no evidence to contradict this answer. And the rule is settled that in the absence of evidence this answer is to be taken as true. *Kergin v. Dawson*, 1 Gilm. 86; *Ill. C. R. R. v. Cobb*, 48 Ill. 402; *Chicago & St. L. R. R. v. Killenberg*, 82 Ill. 295; *Manowsky v. Conroy*, 33 Ill. App. 141; *Holton v. So. Pac. R. R.*, 50 Mo. 151; *C. & St. L. R. R. v. Hindman*, 85 Ill. 521; *Wade*, Attachment (Ed. 1886), Sec. 381; *Schwab v. Gingerbeck*, 13 Ill. 697; *Chicago, R. I. & P. Ry. v. Mason*, 11 Ill. App. 525.

Where the answer of a garnishee discloses parties and interests adverse to the rights of the execution debtor, than whom the garnishing creditor has no greater rights, it is the duty of the court, in order to protect the rights of such parties, to see that they are properly brought before the court, so that the rights of all parties in interest may be adjudicated. Until that was done the case was not in condition to be heard, etc. *Hamburg Co. v. Kennedy*, 57 Ill. App. 136; *Greenwick v. Columbia Mfg. Co.*, 73 Ill. App. 560.

And when the answer disclosed the interest of Newton Morganroth, it was the duty of the court to see that he was properly brought before the court. *Hamburg, etc., Co. v. Kennedy*, 57 Ill. App. 136; *Savage v. Gregg*, 150 Ill. 161.

The sworn answer of the garnishee may be read to the jury and is evidence in his behalf. *Schwab v. Gingerbeck*, 13 Ill. 697; *Wade* on Attachment (1886 Ed.), Sec. 381.

If the garnishee is to be held upon his answer, it must be upon the whole answer. Chicago, R. I. & P. R. R. v. Mason, 11 Ill. App. 525.

NEWMAN, NORTHRUP & LEVINSON, and ELMER E. JACKSON, attorneys for appellee, contended that the evidence produced on behalf of the plaintiff made out a *prima facie* case. Hurd's R. S. Ill. (1897), Chap. 32, Sec. 8, p. 423; World's Fair Excur. Co. v. Gasch, 162 Ill. 408; Coalfield Coal Co. v. Peck, 98 Ill. 139; McCoy v. Williams, 1 Gilm. 591.

MR. JUSTICE ADAMS delivered the opinion of the court.

September 4, 1896, Thurston recovered judgment by confession in the Circuit Court against appellee for the sum of \$550 and costs; an execution was issued the same day, and returned no property found, and, on the same day, an affidavit in the usual form being filed, appellant was summoned as garnishee and interrogatories were filed.

Appellant, November 17, 1896, filed an answer denying any indebtedness to appellee, or the possession or control of any of its property.

Interrogatory 6 was as follows:

"Did you subscribe for any shares of capital stock of Tivoli Amusement Co.? If so, state the number, date when subscribed, amount paid for the same, with dates and manner of payment, and to what officer you paid the same."

To this interrogatory appellant, February 11, 1896, answered:

"I subscribed for twenty-five shares; paid \$2,000. There has been no assessment levied or call made for the unpaid amount of such subscription."

May 17, 1896, appellant further answered as follows:

"This defendant reserving unto himself all benefit and advantage under his answer filed November 17, 1896, and his further answer filed February 11, 1898, further answering, says upon information and belief: That on or about the 3d day of September, A. D. 1896, and before the commencement of this suit, the said Tivoli Amusement Company did sell and assign and transfer by bill of sale or otherwise, all of its property, choses in action and assets of

every kind and nature, to one Newton Morganroth, in consideration, or in consideration, among other things, of the agreement, undertaking and promise of the said Newton Morganroth by him then and there made to and with said Tivoli Amusement Company, to pay all the debts of said Tivoli Amusement Company, and that said sale, assignment and transfer was made at the instance or by and with the assent of said Allyn W. Thurston; and that said sale, assignment and transfer, did sell, assign and transfer to said Morganroth the subscription of this respondent and other subscribers to the stock of said company, and the alleged liability of this respondent upon said subscription. And so this respondent says that at the time of the commencement of this suit, and at the time when this respondent was summoned as garnishee herein, this respondent was not and is not indebted to said company in any way whatever."

Appellant's several answers were sworn to. Replications were filed and a trial was had, resulting in a verdict, by direction of the court, and judgment for the sum of \$500. To reverse this judgment is the object of this appeal.

Section 11 of the garnishment act provides:

"If it appears that any goods, chattels, choses in action, credits or effects in the hands of a garnishee are claimed by any other person, by force of an assignment from the defendant, or otherwise, the court or justice of the peace shall permit such claimant to appear and maintain his right. If he does not voluntarily appear, notice for that purpose shall be issued and served on him in such manner as the court of justice shall direct."

The answer to the sixth interrogatory sets up a perfect defense, and if true that appellee had sold and assigned to Morganroth all its property and choses in action, including appellant's unpaid subscription for stock, and appellant had notice of that or any claim which Morganroth had to such unpaid subscription, appellant was bound, for his own protection, to disclose this in his answer, as otherwise he would not be protected by any judgment which might be recovered against him in appellee's name for Thurston's use, against any valid claim which Morganroth might subsequently assert. Drake on Attachment, 5th Ed., Sec. 630.

Morganroth did not appear in the suit, nor was any notice

served on him. The matter does not appear to have been called to the attention of the court until after appellee had closed its evidence, and while appellant's attorneys were putting in their evidence, when appellant's attorneys read to the court appellant's answer to the sixth interrogatory, and moved the court that Morganroth might be brought in, or that the trial might be arrested until he could be brought in, which motion the court substantially overruled, and the trial proceeded. Appellee's counsel object that it was then too late to make such motion; also, that the answer to the sixth interrogatory above quoted was not filed until about a week before the trial. This objection assumes that it was primarily the duty of appellant to move the court to enter an order directing notice to Morganroth. But the statute does not so provide, nor does it provide, as appellee's counsel seem, by implication, to assume, that the garnishee, in his answer, must pray for such notice. The only duty of the garnishee is to disclose, in his answer, the interest or claim of a third party or third parties, of which he has notice. The judgment creditor can only recover such indebtedness as the judgment debtor could recover from the garnishee in a suit by the former against the latter, and it is incumbent on the judgment creditor to prove that the indebtedness of the garnishee is to the judgment debtor, and not to some one else. This being true, it would seem that when it is disclosed by the answer of the garnishee, as in the present case, that the chose in action in controversy has been assigned by the judgment debtor to a third party, it is the duty of the judgment creditor to notify such third party as may be directed by the court. To say the least, it is no more the duty of the garnishee to move for such notice, than of the judgment creditor. So far as the duty of giving such notice is concerned, we do not deem it important that the answer disclosing Morganroth's interest is on information and belief. If the garnishee has notice or information that a third party claims an interest in the fund or property in controversy, he must, if he would protect himself against such claim, disclose it by his answer, even though he can not, of

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his own knowledge, swear to the existence of the claim or its precise nature.

In *Fire Ins. Co. v. Kennedy*, 57 Ill. App. 136, the court say:

“Where the answer of the garnishee discloses parties and interests adverse to the rights of the execution debtor, than whom the garnisheeing creditor has no greater rights, it is the duty of the court, in order to protect the rights of such parties, to see that they are properly brought before the court, so that the rights of all parties in interest may be adjudicated. Until that was done, the cause was not in a condition to be heard, and it was error to force the appellant to a trial in their absence.”

We fully concur in this view. Such being the law, and the judgment creditor being the actor in the garnishment proceeding, and, therefore, most interested in having it go on, it is incumbent on him, if he desires to speed the proceeding, to move the court for an order directing notice to the adverse claimant.

This is sufficient to dispose of the appeal, but inasmuch as there may be another trial, we deem it expedient to notice other questions which arose in the trial court, and may again occur.

Appellant offered to read his answer to the jury, but the court excluded it. In *Schwab v. Gingerbeck*, 13 Ill. 697, the court held that the garnishee had the right to have his answer before the jury, who were to give such weight to it as they believed it was entitled to under all the circumstances of the case. We understand, however, that the effect of an answer responsive to the interrogatories is, as stated by the court in *Kergin v. Davison*, 1 Gilm. 86, namely:

“Under these provisions of the act, when the garnishee has made a full and explicit answer to the interrogatories, and it fails to show either that he is indebted to the defendant in the attachment, or that he has any of his property in his possession, the presumption arises that the answer is true, and the burden of disproving it is thrown on the plaintiff.”

We do not understand that when the garnishee discloses by his answer that there is an adverse claimant, it is incum-

bent on the judgment creditor, or attaching creditor, as the case may be, to produce negative evidence in the absence of the alleged adverse claimant, to show that such alleged claimant has no interest in the fund or property in question.

The only object of disclosing, by the answer, that there is such adverse claimant, is the protection of such claimant and the garnishee. When such claimant comes voluntarily or on proper notice to assert his claim, the issue, as to his claim, is between him and the judgment creditor and the judgment debtor, or defendant in attachment, if the latter disputes the claim, and the burden of proof in such case is on the adverse claimant. We perceive no error in the exclusion by the court of evidence that appellee, prior to the recovery of judgment against it, had property subject to execution, especially in view of appellant's answer that prior to that time all its property had been sold and disposed of to Morganroth. Neither do we perceive any error in the exclusion of evidence of negotiations between appellant and Morganroth, in July, 1896, in respect to appellant's stock, the record showing that appellant continued to hold his stock down to the time of the trial.

The judgment will be reversed and the cause remanded.

OPINION BY MR. JUSTICE ADAMS, on petition for rehearing.

Appellee petitions for a rehearing on the alleged ground that it was insolvent when it assigned its assets to Morganroth, and therefore, that the assignment was void as to creditors. This question was not discussed or even suggested in appellee's argument, and it is a well known rule of practice in this court, that the court need not, and, as a general rule, will not, consider questions not discussed or objections not relied on by counsel in argument. But even though we were to consider the question now raised, it would not avail appellee for the following reasons. The answer of the garnishee as to Morganroth's interest is on information and belief, and even if it were not, it would not bind Morganroth. The only effect of the answer as to Morganroth's interest is to disclose that he claims some

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interest. It will be for him, when brought in by notice, to state what interest, if any, he has, and how acquired, and then, and not till then, the question may arise whether he has any legal or equitable interest in appellee's assets. Morganroth may disclaim all interest, or he may claim that he has acquired an interest otherwise than as stated in the answer of the garnishee. We have not intended to express, nor do we express, any opinion on that question. Petition denied.

**Paul Dickinson v. Charles L. Boyd, Assignee of the
Garden City Foundry Co., Insolvent.**

1. **TENDER—Practice in Cases of.**—Where a tender is made before suit, and the money subsequently paid into court, it is the duty of the court upon the defendant's application to order it paid to the plaintiff in satisfaction *pro tanto* of his claim. If the plaintiff is successful in his suit he will be entitled to judgment for the balance, with costs of suit.

Assumpsit, on the common counts. Trial in the County Court of Cook County; the Hon. H. R. S. WHEATLEY, Judge, presiding. Finding and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded. Rehearing denied. Opinion filed April 11, 1899.

CHURCH & McMURDY, attorneys for appellant.

MUND & SIMONTON, attorneys for appellee.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

Appellant became indebted to appellee for various sums, there being apparently a running account between the parties. Appellant and the Northern Electric Railway Co., of which he is president, were each indebted to a third party, the Excelsior Machine and Boiler Works. Appellee, as assignee of the Garden City Foundry Co., the insolvent, had retained as manager of the foundry, one Turner, its former president. An arrangement was made between Turner and

appellant, by which it was agreed that the debt to the Boiler Works due from appellant and that due from the Northern Electric Railway Co., of which appellant is president, should be paid in castings to be furnished the Boiler Works by the insolvent company, for which appellant was to pay.

There seems to be serious controversy over the facts. But it is contended by appellant that there was an agreement between himself and Turner, by which, instead of paying cash to the assignee for the castings thus furnished at his request and applied to pay his debts and that of the railway to the Boiler Works, he was to pay a building and loan association and credit the payment upon a note made by Turner which was owned by appellant, and secured upon the property occupied by the insolvent foundry works. It was admitted by appellant's counsel that the items in controversy were delivered by the assignee, and there is evidence tending to show that appellant admitted that he owed the whole amount sued for, but at the same time claimed that he was to pay to the assignee only a part of it, and was to pay for the remaining items in controversy, not to the assignee, but to the building association.

The agreement, by virtue of which appellant says he was to pay for the castings to the building association, and not to the assignee, who furnished them, is said to have been made with Turner only. But appellant testifies that the assignee told him, when he went there the first time after the assignment, that Turner "would manage the business, and any agreements or arrangements made with him would be all right."

There is no dispute that Turner was employed by the assignee to manage the business, and that any agreements relating to the purely business management, such as the manufacture and delivery of goods, Turner was authorized to make. Further than this, the evidence does not warrant the contention that Turner had authority to bind the assignee.

It was, however, sought to show that the assignee had

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ratified the agreement by Turner as to the manner of payment. Appellant's testimony is: "I spoke to him (the assignee) once or twice about it, but it was always when some plan was in consideration to take this estate out of his hands;" and that the assignee "always said he didn't care what was done with the \$600, so long as we took the estate out of his hands." Appellant's counsel offered to prove that the assignee told appellant that he knew the agreement in controversy had been made, "and that the estate would live up to it."

The court excluded this testimony; but if admitted it would not have materially improved the appellant's case. The assignee was an officer of the court and there is no evidence tending to show any authority, order of court, or circumstances, which could justify him in diverting a part of the assets of the insolvent company in payment of any personal debt of its president or any obligation of the company itself except in the regular method of distribution and payment on account of claims regularly proven and allowed in the ordinary way.

Appellant's counsel are, we think, mistaken in contending that the agreement of Turner with appellant, whatever it may have been, is the basis of the action in this case. The basis of the action is, as we understand it, the delivery of property upon appellant's order for which appellant agreed to pay. The method of payment, as agreed upon with Turner, was not binding upon the assignee. This the appellant must be presumed to have known, and to have acted at his peril. He can not be relieved of his obligation to pay for goods delivered at his request and which he used to pay his own debt. These goods were not, as we understand the facts, delivered in payment of the debt of another. The obligation was directly incurred by appellant.

Appellant complains of the exclusion of certain testimony, some of which might properly have been admitted. But we have considered the case as if the evidence offered by appellant's counsel had been introduced.

It is urged that the judgment was erroneous because it

included a part of the claim sued for which had been tendered to the assignee before suit was brought and was paid into court upon the refusal of appellee to accept it. In *Monroe v. Chaldeck*, 78 Ill. 429, 432, where the evidence did not show a tender before suit and the money was not paid into court it was said :

"This position might be regarded with some force, had it appeared the amount named in the plea was actually offered appellee before suit was instituted, and this followed up by bringing the money into court subject to the order of the court. The correct practice, had this been done, would have required the court to have ordered the money tendered paid over to appellee and rendered judgment against him for the costs."

In the present case the tender was made before suit, and the money subsequently paid into court. Upon appellee's application it would have been the duty of the court to order it paid to appellee in satisfaction *pro tanto*. Inasmuch, however, as the sum tendered was only a small part of the amount due appellee, he was entitled to judgment for the balance with costs of suit. The judgment will, therefore, be reversed and the cause remanded with directions to the County Court to order the amount of the tender, which was deposited in court, paid over to appellee, and deducting it, render judgment in his favor for the remainder. Reversed and remanded with directions.

**Garrie S. French v. The Commercial National Bank and
Edward B. McKey.**

1. **CONTEMPT—Power of the Court to Punish.**—The Superior Court of Cook County is warranted in entering a temporary order restraining a party from enforcing the collection of costs recovered by him in a former appeal, pending the result of a hearing before the master in relation to the surrender by him to a receiver of certain property alleged to be held by him.

Contempt Proceedings.—Creditor's bill. Trial in the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Order of

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restraint, etc., entered; appeal. Heard in this court at the March term, 1899. Affirmed. Opinion filed April 17, 1899.

GABRIEL S. FRENCH, attorney *pro se*; GAGE & DEMING, of counsel.

JAMES J. BARBOUR, attorney for appellees.

MR. JUSTICE SEARS delivered the opinion of the court.

Appellant was one of defendants in a suit begun by a creditor's bill. It was alleged that appellant had in his possession certain property equitably subject to the control of the court in the proceeding. A receiver was appointed. In the course of efforts to compel appellant to turn over such property as he had, which was subject to the operation of the suit, an order was entered directing appellant to appear for examination in that behalf before a master in chancery. For disobedience to the order appellant was adjudged in contempt of the court, and a fine of \$500 was imposed, as well as imprisonment by way of punishment and to enforce the order of the court. An appeal was prosecuted to this court by appellant, and the order was reversed upon the ground that the punishment was excessive.

The amount of the costs in that appeal, for which appellant recovered judgment against appellees, of whom McKey, the receiver, was one, was \$118.75.

The court below has now entered an order restraining appellant from enforcing the collection of this sum of \$118.75 from appellees, until it shall be determined, by a hearing now being had, just how much, if any, of the property which should be turned over to the receiver, appellant has in his possession. From this restraining order the appeal here is prosecuted. The order is in effect a temporary order pending the result of the hearing before the master. We are of opinion that the court was warranted by the facts in entering such temporary order. The order is affirmed.

Julius Brieske et al. v. The North Chicago St. Ry. Co.

1. **SPECIFIC PERFORMANCE—When the Consideration is Illegal.**—The signatures of abutting property owners to a petition to a city council, charged with a public trust, for the laying of railroad tracks in a public street by a corporation, charged with a public duty, can not be lawfully purchased, and a consideration moving to the exclusive benefit of such owners for their signatures to such a petition and their consent to such a grant and an agreement based thereon, being opposed to public policy, will not be enforced by the courts.

2. **SAME—When Against Public Policy.**—Public policy will not permit a party to enforce a promise which he has obtained by an illegal act, although he may have connected with such act another which is legal.

3. **CONTRACTS—Part of the Consideration Void.**—As a general rule if any part of an entire consideration for a promise, or any part of an entire promise be illegal, whether by statute or at common law, the whole contract is void.

4. **SAME—Consideration Illegal in Part.**—A contract illegal in part and legal as to the residue is void as to all when the parts can not be separated; when they can be the good will stand and the rest fall. One entire consideration can not within this rule be separated, though composed of distinct items, some of which are legal and others illegal.

5. **SAME—Consideration Void in Part.**—If part of a consideration be merely void the contract may be supported by the residue of the consideration, if good *per se*, but if any part of a consideration be illegal it vitiates the whole.

Bill for Specific Performance.—Trial in the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Bill dismissed on demurrer; appeal by complainants. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed May 2, 1899.

GEO. C. BUELL and G. W. AMBROSE, attorneys for appellants.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellee.

If any part of a consideration be merely void the contract may be supported by the residue, if good *per se*, but if any part be illegal, it vitiates the whole. *Cobb v. Cowdrey*, 40 Vt. 25.

As a general rule if any part of an entire consideration

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for a promise, or any part of an entire promise, be illegal, whether by statute or at common law, the whole contract is void. "If a part of the consideration is illegal, the whole consideration is void, because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or an illegal promise, although he may have connected with this act or promise, another which is legal." (Parsons on Contracts, Vol. 1, p. 380.) And it is believed that he announces a well recognized rule of the common law. *Henderson v. Palmer*, 71 Ill. 583; see also *Coppell v. Hall*, 7 Wall. 538; *Shenk v. Phelps*, 6 Ill. App. 620; *Lyon v. Waldo*, 36 Mich. 345; *Snyder v. Willey*, 33 Mich. 483; *Mutual Benefit Association v. Hoyt*, 46 Mich. 473; *Doane v. The Lake Street Elevated R. R. Company*, 165 Ill. 510; *Dewey v. Bell*, 5 Allen (Mass.), 165; *Doane v. Chicago City Ry. Co.*, 160 Ill. 22; *Tobey v. Robinson*, 99 Ill. 233.

MR. JUSTICE SHEPARD delivered the opinion of the court.

A bill in equity was filed by the appellants to enforce the specific performance of the contract hereinafter set forth, the particular relief sought being to recover from the appellee the amounts of money paid out by appellants for paving Southport avenue, mentioned in the second clause of the contract. A general demurrer to the bill was sustained and the bill dismissed at appellants' costs.

The contract was as follows :

"CHICAGO, September 27, 1894.

Agreement between residents of Southport avenue and North Chicago Street Railroad Company, Julius Brieske, Chairman.

DEAR SIR: In consideration of the good will and co-operation of the residents of Southport avenue, from Clark street to Clybourn place, and their respective signatures to a petition to grant the North Chicago Street Railroad Company permission to construct and operate a line of street railways on said Southport avenue, between Lincoln avenue and Clybourn place, the North Chicago Street Railroad Company hereby covenants and agrees to pay to such a one as your committee may appoint, the sum of your obligation to your attorneys, which sum is not to exceed four hundred

dollars (\$400), and a further sum of two hundred and fifty dollars (\$250), as reimbursements for the amount of assessments collected from the people whom you represent, and as payment for the time and trouble of your committee, which sums are to be paid immediately upon construction of the said railway line on Southport avenue.

And further, the North Chicago Street Railway Company hereby covenants and agrees to pay unto each and every owner of property abutting on said Southport avenue from Clark street south to Clybourn Place, the amount of money paid out respectively by said owners for the paving of said Southport avenue to the extent of a space of sixteen feet in width, to be occupied by said railroad company, which amounts are to be paid to the citizens of Southport avenue immediately upon the construction of the above described street railway.

This agreement is made for the purpose of securing a unanimous vote on Southport avenue, and that the differences which have so long existed to our mutual detriment be now and for the future removed.

NORTH CHICAGO ST. R. R. Co.

By D. H. LOUDERBECK."

Appellee makes the point, which seems to be borne out by the record, that the bill is fatally defective in failing to allege a performance by appellants of their part of the agreement, to sign the petition (to the city council ?) for a grant to appellee of permission to lay tracks and operate its road upon the avenue named, and appellants make no reply to that point.

But we will pass by that question, and consider the broader one that is discussed by both sides.

It will be seen by an examination of the contract, that the promise of appellee sought to be enforced, is based upon the expressed consideration of their good will and co-operation, and their signatures to a petition to grant to appellee permission to construct and operate a line of street railroad in Southport avenue. It seems to be conceded that Southport avenue is one of the public streets of the city of Chicago.

In view of what was decided in *Doane v. Chicago City Ry. Co.*, 160 Ill. 22, there can be no hesitation in holding,

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as was there held, that the signatures of abutting property owners to a petition to a city council, charged with a public trust, for the laying of railway tracks in a public street, by a corporation charged with a public duty, can not be lawfully purchased; that a consideration moving and inuring to the exclusive benefit of such owners for their signatures to such a petition, and their consent to such a grant, and an agreement based thereon, will not be enforced by the courts because of being opposed to public policy, and therefore illegal. For the convincing reasons underlying the doctrine, we need only refer to that case.

If it be said, as urged by appellants, that the agreement was in compromise of conflicting rights and differences that had long existed between appellants and appellee concerning the use of Southport avenue by appellee for a railway, and that future good will and co-operation between them were lawful considerations, the law which stamps with its disapproval a contract based upon an entire consideration, any part of which is illegal, is in no wise satisfied.

"Nothing is better settled in the law of contracts than that if any part of the consideration upon which a promise rests is illegal, the entire promise fails. But this is not true *e converso*." *Tobey v. Robinson*, 99 Ill. 222.

That was a case where one of the purposes constituting the consideration was admittedly legal, but the other was not.

"As a general rule, if any part of an entire consideration for a promise, or any part of an entire promise, be illegal, whether by statute, or at common law, the whole contract is void. If a part of the consideration is illegal, the whole consideration is void, because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or an illegal promise, although he may have connected with this act or promise, another which is legal." *Henderson v. Palmer*, 71 Ill. 579.

"A contract illegal in part and legal as to the residue, is void as to all, when the parts can not be separated; when they can be, the good will stand and the rest fall. One entire consideration can not, within this rule, be separated, though composed of distinct items, some of which are legal and others illegal." *Bishop on Contracts*, Sec. 487, and cases cited.

What part of the agreement in question can be said to have support in the lawful consideration said to exist, separated from the consideration that is illegal?

Nor does the fact alleged by the bill that appellee paid the attorney's fees and expenses of appellants' committee, amounting to \$650, as agreed to be paid by the first clause of the agreement, estop the appellee from denying the illegality of the consideration at this time.

Any attempt to enforce an illegal contract will fail whenever the illegality appears. The defense in such cases must be treated as that of the public, and not of the defendant. *Shenk v. Phelps*, 6 Ill. App. 612; *Lyon v. Waldo*, 36 Mich. 345.

In *Coppel v. Hall*, 7 Wallace, 542, the Supreme Court of the United States, speaking by Mr. Justice Swayne, said:

"The instruction given to the jury, that if the contract was illegal the illegality had been waived * * * was founded upon a misconception of the law. In such cases there can be no waiver. The defense is not allowed for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim *ex dolo malo non orator actio* is limited by no such qualification. * * * Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection, would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."

So also in *Lyon v. Waldo*, 36 Mich. 345, it is said:

"Where a contract is tainted with illegal consideration, it is rendered incapable of confirmation by acts of part performance. Whatever is done toward carrying it out is regarded as done under the obligation of honor, and not under the sanction or obligation of law, and what remains stands on the same basis. The performance of it may be required by the sentiment of honor, but the law does not attach and bind the party to complete the unlawful com-

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pact. The principle is recognized in *Snyder v. Willey*, 33 Mich. 483, and in other cases too numerous for citation. *Cole v. Gibson*, 1 Ves. Sr. 503, is one of the earlier authorities.

"The defense of illegality is a peculiar one, and in its nature differs from most others. The objection is rather that of the public speaking through the court, than of the defendant as a party to the contract. The law disallows all proceedings in respect of illegal contracts, not from any consideration of the moral position and rights of the parties, but upon grounds of public policy. However dishonorable, however culpable the defendant may be, the result is the same, and however numerous may have been the acts of part execution, they can not cleanse the contract of the impurity of its origin, and cause it to be the duty of a court of justice to respect and enforce it."

The distinction may well be noted, in this connection, between a contract supported by a consideration void in part, but good as to the residue, and one of which the consideration is illegal, either in part or in whole.

"The general principle is, that if part of a consideration be merely void, the contract may be supported by the residue of the consideration, if good *per se* (citing cases); but if any part of a consideration be illegal, it vitiates the whole (cases cited)." *Cobb v. Cowdrey*, 40 Vt. 25.

In so far as the doctrine of *ultra vires* has been referred to by appellants in their brief, or in authorities cited, we fail to see any application of it to the case in hand.

The enforcement of the agreement is not resisted, nor is it denied by us, because of it being beyond the power of appellee to make, but simply because of the illegality of its consideration.

The decree of the Circuit Court is affirmed.

Lillie R. Boisot v. Anna S. Chandler.

1. DEFICIENCY DECREES—*Sufficiency of the Bill to Sustain*.—An allegation in a bill to foreclose a trust deed that certain other persons, naming them, have, or claim to have, some interest in said premises, or have assumed the payment of the indebtedness secured by said trust deed, which interests, however, if any there be, have accrued since and

are subject to the lien of such trust deed, is not sufficient to support a deficiency decree.

2. *SAME—Assumption Clauses.*—The law requires something more than the mere insertion by the grantor of a clause in a deed that the grantee assumes an incumbrance. The grantee's assent to the contract must in some way appear.

Foreclosure, of a trust deed. Trial in the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Decree for complainant; appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed May 2, 1899.

LOUIS BOISOT, JR., attorney for appellant.

Where there are alternative allegations, that allegation is chosen which is least favorable to the pleader. *Titus v. Mabee*, 25 Ill. 257; *Jamieson v. King*, 50 Cal. 132; *Lucas v. Oliver*, 34 Ala. 626; *Ryves v. Ryves*, 3 Ves. Jr. 343; *Edwards v. Edwards*, Jac. 335.

STILLMAN & MARTYN, attorneys for appellee, contended that the allegation that the defendants "have assumed the payment of the indebtedness" sought to be foreclosed is sufficient to sustain a decree for the deficiency. *Simonson v. Blake*, 20 How. Pr. 484; *Pellier v. Gillespie*, 67 Cal. 582; *Brownell v. Brattleboro Savings Bank*, 69 Ill. App. 122.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

This is an appeal from a deficiency decree.

The bill of complaint seeks to foreclose a trust deed, and after setting up the execution of the note therein described, states that appellee, together with certain other persons, "have or claim to have some interest in said premises, or have assumed the payment of the indebtedness secured by said trust deed, which interests, however, if any there be, have accrued since and are subject to the lien of the trust deed hereby sought to be foreclosed." The bill prays for an execution for the collection of any deficiency "from any defendants who may be found liable therefor," and for general relief.

Appellant contends that the allegations of the bill are

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not sufficient to sustain the deficiency decree, there being no averment of the acceptance of the deed of conveyance containing the assumption clause.

In *Thompson v. Dearborn*, 107 Ill. 87, it is said :

"In order to make the assumption clause in the deed binding and obligatory on Thompson, it was necessary to go one step further and show that he assented to that clause in the instrument. This might be done by showing that he signed and sealed the deed. Had he done this, then he would have been a party to the contract. Or it might be shown that the deed was delivered to and accepted by him. Had he accepted the deed, his assent to all that it contained would have been inferred in like manner as if he had signed and sealed the instrument. The law requires something more than the mere insertion by the grantor of a clause in the deed that the grantee assumes an incumbrance. The grantee's assent to the contract must in some way appear."

It is said in that case that had the bill averred the deed had been delivered and accepted, the case would have been relieved of difficulty. But it was alleged only that the premises had been sold and conveyed to Thompson by the deed in question, and that in and by said deed Thompson "assumed payment of said trust deed and covenanted and agreed to pay the same as part of the consideration or purchase money." It was held that the averment was not sufficient to authorize a money judgment against Thompson.

In *Baer v. Knewitz*, 39 Ill. App. 470, the allegation was that the grantee "in and by said deed assumed to pay as part of the consideration." The averment was held insufficient to sustain a money decree.

In *Miller v. Schaefer*, 75 Ill. App. 389, it is said that "there can be no valid decree without allegations in the bill as basis for it. It is quite as essential that there be allegations in the bill as proof to sustain the decree."

It is urged by counsel for appellee that the allegation that appellee and others "assumed payment of the indebtedness," means and is equivalent to an allegation that such persons, as purchasers, had agreed with the vendor, in consideration of the conveyance, to pay the mortgage. It has been held, however, in the cases above cited, that these

words do not constitute a sufficient averment to sustain a money decree. It is, moreover, rather a statement of a conclusion than an allegation of fact.

Appellee suggests that this question of the sufficiency of the allegation can not be considered; that an appeal from a deficiency decree does not bring up for review the original decree of sale, and that the deficiency decree is founded upon the original.

The original decree grants no relief against appellee, further than to divest her of interest in the land as against the trust deed. It does confirm the master's report, and finds, as did the master, that appellee "accepted said deed, and went into possession of said premises under it, and thereby became and is personally liable for the payment of said indebtedness." But the master's report and a decree finding accordingly do not obviate the necessity of proper allegations in the bill to charge the defendant with whatever liability the decree seeks to enforce. There is sound reason for so holding. A party defendant, finding in the bill no averments charging personal liability, is not required to anticipate that testimony will be introduced to prove, and that the master will find, a liability which the bill of complaint does not assert. A deficiency decree, no less than any other, must be based upon proper allegations in the bill. The defect was not a mere matter of form, objection to which must be taken by demurrer; it is a matter of substance, the absence of a necessary allegation to sustain the decree. We think the objection is raised in apt time, and that the allegations of the bill are not sufficient to sustain the deficiency decree.

Other errors are assigned which, in the view we are compelled to take, we do not find it necessary to discuss. The conclusion we have stated is, however, emphasized by the alternative averments in the bill, which allege that the defendants named have or claim some interest, or have assumed payment, and leave it doubtful whether appellee is included in the former or latter clause of the alternative.

The decree of the Circuit Court is reversed and the cause remanded.

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1. **CONSTRUCTION OF CONTRACTS—Insurance Policies.**—An insurance policy on rolling stock to be covered wherever it may be, must be construed in the light of the character of the business of the assured, being in this case that of a general transfer business for other railroad companies, and as covering cars which come to its possession in its business.

2. **LIMITATIONS—In Policies—Estoppel to Assert.**—In order that the limitation clause of an insurance policy, as a defense, may be considered waived, or the company barred from making it, though not in a strict sense estopped by acts *in pais*, strong proof is not required, nor is it necessary that the proof should establish facts equivalent to a technical estoppel, but only such facts as make it unjust, inequitable or unconscionable to allow the defense to be interposed.

3. **WAIVER—Of Proofs of Loss.**—Where an insurance company repudiates its liability within the time fixed by the policy for the furnishing of proofs of loss, such action is a sufficient waiver of notice or proofs of loss.

Assumpsit, on a policy of insurance. Trial in the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed April 17, 1899.

Statement of the Case.—Appellant issued its policy of insurance indemnifying appellee against loss or damage by fire, among other items, viz.: “\$52,750 on rolling stock as described below or leased, and for which the assured is liable, which is to be covered wherever it may be,” etc., including box, coal and refrigerator, as well as flat cars. The policy contained provisions requiring notice in writing by the assured to appellant of loss or damage by fire within six days, and within thirty days from the fire a particular and specific account of the loss, and a failure to give such notice and account within said thirty days rendered the policy void; also that if the interest of assured in the property be other than the exclusive ownership, the company must be so notified, and such interest be so expressed in the written part of the policy, or that should render the policy void; also, that no suit against appellant for the recovery of any claim

by virtue of the policy should be sustainable until after an award, as provided by the policy, nor unless such suit should be commenced within twelve months after the date of the fire from which such loss shall occur; also that any person other than the assured, who may have procured the insurance to be taken by appellant, shall be deemed the agent of the assured and not of the company.

There were five losses during the life of the policy; the first October 28, 1892, and the last August 24, 1893. Appellant waived proof of loss in each of the first three cases by denying all liability under the policy, for the reason, as its agent claimed, that appellee was not the actual and exclusive owner of the property alleged to have been destroyed, of which the company was not notified, and therefore it was not liable under the terms of the policy. No question is made as to the notice in the other two cases.

The declaration was a special count on the policy and the common counts. Besides the general issue, appellant presented by appropriate pleas, three defenses, viz., first, failure to give notice within thirty days after each fire; second, that appellee's interest in the property was not exclusive, of which appellant was not notified; and, third, that the suit was not begun within twelve months after the dates of the fires and losses. This last plea is numbered four.

The present suit was begun April 6, 1896, but on October 13, 1893, appellee began a suit on the same cause of action, which was placed at issue and was pending until January 28, 1896, when it was dismissed by the court on a preliminary call of the calendar by the court, without notice to either party. Prior to the dismissal on February 9, 1895, by stipulation between the parties, a jury was waived and the cause was set for trial before the court without a jury, on April 3, 1895, and also upon stipulations the day of trial was postponed from time to time thereafter, and finally fixed on June 25, 1895, when, on motion of appellant, and because of the illness of appellant's attorney, an order was made by the court, Judge Payne, continuing the cause until after vacation of the court; that thereafter the clerk, in vio-

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lation of the said stipulations and order of the court, and without notice to appellee, placed said cause on the calendar of Judge Sears for trial. On a preliminary call of this trial calendar, and without notice to appellee, the suit was dismissed for want of prosecution. Appellee had no knowledge of the dismissal until after the lapse of the term of court at which the dismissal was had, but as soon as the order of dismissal came to its knowledge, appellee requested appellant and its counsel to consent to set aside the order of dismissal, which was refused, and the present action was commenced within sixty days of said dismissal. These facts were set out in the second replication to appellant's fourth plea in the present case, setting up the one year limitation contained in the policy. Appellant demurred to this replication, which was overruled. It then rejoined, taking issue on the facts alleged in the replication. Issues were also made on the other pleas of appellant, which need not be set out because of any questions presented. A trial was had before the court and a jury which resulted in a verdict and judgment for appellee, from which this appeal is prosecuted.

At the beginning of the trial appellant moved the court to set aside the order overruling the demurrer to said replication, which motion was overruled.

The essential facts alleged in the said replication are sustained by the evidence, and the evidence also shows that appellee's losses by the several fires were, with interest, the amount of the verdict and judgment.

GEO. S. STEERE, attorney for appellant, contended that the limitation clause in the policy is valid in Illinois. *Johnson v. Humboldt Ins. Co.*, 91 Ill. 92; *Allemania Ins. Co. v. Little*, 20 Ill. App. 431; *Phoenix Ins. Co. v. Lebsher*, 20 Ill. App. 450.

Chapter 83, Sec. 25, Illinois Statutes (22 Starr & Curtis, 2642), does not affect the case, and the involuntary non-suit sustained in the prior action does not avoid the effect of the limitation clause. *Riddlesbarger v. Hartford Fire Ins. Co.*, 7 Wall. 386; *Melson v. Phenix Ins. Co.*, 97 Ga. 722, 25 S. E. Rep. 189; *McElroy v. Continental Ins. Co.*, 48 Kan. 200,

29 Pac. Rep. 478; Willson v. Ins. Co., 27 Vt. 99; Howard Ins. Co. v. Hocking, 130 Pa. St. 170; 18 Atl. Rep. 614; McFarland v. Ins. Co., 6 W. Va. 437.

EDGAR A. BANCROFT, attorney for appellee.

The conditions in an insurance policy are to be strictly construed against the company, and all doubts as to the meaning of any provision are to be resolved in favor of the assured. *Leach v. Republic F. Ins. Co.*, 58 N. H. 245; *Hoffman v. Aetna F. Ins. Co.*, 32 N. Y. 405; *Chandler v. St. P. F. & M. Ins. Co.*, 21 Minn. 85.

The policy upon its face covers foreign cars. But even if it did not, the evidence would require its provisions to be construed to cover such losses.

Whoever solicits insurance, or acts as a go-between in the issuance of the policy, is the agent of the insurance company, despite a clause in the policy stating that he shall be regarded as the agent of the assured. *R. S.*, Ch. 73, Sec. 22; *S. & C.*, 2d Ed., 2218; *Com. Ins. Co. v. Ives*, 56 Ill. 402.

Stokes was the agent of appellant, and his knowledge of the interest of the assured and the nature of the property sought to be covered by the policy, is chargeable to the insurance company. *Insurance Co. v. Chestnut*, 50 Ill. 111; *Phoenix Ins. Co. v. Stocks*, 149 Ill. 319; *Phoenix Ins. Co. v. Hart*, 149 Ill. 513; *Home Ins. Co. v. Mendlehall*, 164 Ill. 458; *St. P. F. & M. Ins. Co. v. Wells*, 89 Ill. 82; *American Ins. Co. v. Luttrell*, 89 Ill. 314; *Union Ins. Co. v. Chipp*, 93 Ill. 96, 100; *Germania Fire Ins. Co. v. Meka*, 94 Ill. 494; *Continental Ins. Co. v. Ruckman*, 127 Ill. 364.

The insurance company, by denying that the policy covered foreign cars, waived the provision of the policy requiring detailed and formal proofs of loss to be presented within thirty days after a fire. *Con. Ins. Co. v. Ruckman*, 127 Ill. 364; *P. M. & F. Ins. Co. v. Whitehill*, 25 Ill. 466; *German Fire Ins. Co. v. Gueck*, 130 Ill. 345; *Grange Mill Co. v. Western Ins. Co.*, 118 Ill. 396.

Placing a denial of liability upon one ground waives other grounds of defense. *Kimmel v. Ins. Co.*, 161 Ill. 43.

So also the acceptance of proofs without objection waives their defects. *O'Neill v. Buffalo Ins. Co.*, 3 Comst. 122; *Great Western Ins. Co. v. Staaden*, 26 Ill. 360, 365.

And receiving them after time limited in the policy is waiver of the time limit. *German F. Ins. Co. v. Grunert*, 112 Ill. 68.

The limitation was waived by the acts of the appellant averred in the replication to the fourth plea, explaining and excusing the delay in bringing the action. *German F. Ins. Co. v. Grunert*, 112 Ill. 68; *Humboldt Ins. Co. v. Johnson*, 1 Ill. App. 309; *Andes Ins. Co. v. Fish*, 71 Ill. 620, 626; *Home Ins. Co. v. Meyer*, 93 Ill. 271, 276; *Woodbury S. Bk. v. Charter Ins. Co.*, 31 Conn. 517; *Ins. Co. v. Peck*, 133 Ill. 220; *Ill. Ins. Co. v. Baker*, 153 Ill. 240; *Wood on Fire Ins.* (2d Ed.), Vol. 2, Sec. 467, p. 1026; *Peoria M. & F. Ins. Co. v. Hall*, 12 Mich. 202; *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235, 244; *Coursin v. Penn. Ins. Co.*, 46 Penn. St. 323, 331; *Ripley v. Astor Ins. Co.*, 17 How. (N. Y.) 444, 445; *Ins. Co. v. Chestnut*, 50 Ill. 111, 117.

Very slight acts are held sufficient to make out a waiver. *May on Insurance* (3d Ed.), Sec. 488; *Killips v. Putnam F. Ins. Co.*, 28 Wis. 472, 484.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

The principal question presented is as to whether the one year limitation in the policy against bringing suit, defeats this action. Other minor questions, viz., the waiver of proofs of loss, that the property destroyed was not covered by the policy, and that the court erred in the admission and exclusion of evidence, are made, but do not seem to be specially relied on by counsel. It is contended by appellee that, for certain technical reasons enumerated, the defense of the limitation clause in the policy can not be considered. We think otherwise. It is also claimed that the limitation clause is void because it is coupled with a provision to arbitrate before bringing the action. The New York and New Hampshire cases cited by counsel seem to support this con-

tention, but we think the provisions of the policy sued on as to award are such that if followed in good faith by the company, they would not render the limitation clause void. *Johnson v. Ins. Co.*, 91 Ill. 92.

No doubt if the company should fraudulently use the provisions of the policy relating to award in such way as to prevent an award being made within the time limited by the policy for bringing suit, such action could properly be held to render nugatory the limitation clause.

The limitation clause in the policy, while not favored by the courts, is a defense to this action, unless the replication is sufficient to avoid such defense. *May on Ins.*, Sec. 488; *Ins. Co. v. Chestnut*, 50 Ill. 111-7; *Home Ins. Co. v. Meyer*, 93 Ill. 271-6; *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235-41; *Chandler v. Ins. Co.*, 21 Minn. 85.

Has appellant waived this defense or is it estopped from making it?

Appellant claims that certain matters alleged in the plaintiff's replication are not shown by the evidence, but it is not and can not be denied that a former suit for the same cause of action was commenced on October 13, 1893, which was within the period of limitation in the policy; that during the pendency of this suit, and after the limitation had expired, appellant entered into a stipulation waiving a jury and setting the case for trial before Judge Payne; that by stipulation the date of such trial was changed from time to time, and that upon appellant's motion, and by reason of the illness of its attorney, the hearing of the cause was continued from June 25, 1895, until after vacation of the court, and that while the stipulation waiving a jury and agreeing to try the case before Judge Payne was still in force, the case was placed on the trial calendar of Judge Sears, without notice to appellee, and by the latter judge dismissed, also without notice to appellee, and it had no notice of such dismissal until after the term at which the dismissal was entered had expired, and that appellant and its counsel refused to consent to set aside the order of dismissal.

In order that such a defense may be considered waived, or

the insurance company debarred from making it, though not in a strict sense estopped by acts *in pais*, strong proof is not required of waiver, nor is it necessary that the proof should establish facts equivalent to a technical estoppel, but only such facts as would make it unjust, inequitable or unconscionable to allow the defense to be interposed. Chandler and Hay cases, *supra*; Maltman v. R. R. Co., 72 Ill. App. 378-86, and cases there cited; German F. Ins. Co. v. Grunert, 112 Ill. 68-76.

We are of opinion, in view of the uncontroverted facts stated and the authorities cited, that it would be unjust and unconscionable to allow appellant to interpose the limitation in the contract. Appellant's conduct, after stipulating to try the case without a jury before a particular judge, and securing a postponement of the trial by reason of the illness of its attorney, and refusing to reinstate the case after it had been dismissed for want of prosecution by another judge, without notice to appellee and after the lapse of the term, seems so far from good faith and fair dealing that it may be characterized as unjust and inequitable; and while it does not include all the elements of an estoppel *in pais*, it may be regarded, as said by the Supreme Court in the Meyer case, *supra*, as a "sufficient excuse for non-compliance with the provision of a policy requiring suit to be brought within a stipulated time."

The same is true as to the claim that notice or proofs of loss were not made within thirty days from the first three fires. The evidence is not very clear as to the exact date when appellant, through its agent, repudiated liability under the policy by claiming that it did not cover foreign cars, but we think it is sufficient to justify the conclusion that all liability was repudiated within thirty days of each of these losses, and that was a sufficient waiver of notice of proofs of loss. Grange Mill Co. v. Wes. Ins. Co., 118 Ill. 396-401; German F. Ins. Co. v. Grueck, 130 Ill. 345-51; Kimmel v. Ins. Co., 161 Ill. 43-7.

That the language of the schedule in the policy, viz., "on rolling stock as described below, or leased, and for which the assured is liable, which is to be covered wherever it may

be," etc., and describing box, coal, flat and refrigerator cars, is sufficient to cover foreign cars, that being the kind included in the several losses, when construed in the light of the character of appellee's business, being that of a general transfer business for other railroad companies, and that appellee owned but a few flat cars, all of which was known to and discussed by appellee's officers with appellant's agent when the policy was solicited and written, is clear, as we regard it, and beyond controversy.

A policy similar in its terms was considered by the Supreme Court in *Home Ins. Co. v. N. P. Ry. Co.*, 178 Ill. 64, in which it was held that the words, "for which the assured are or may be liable," were sufficient to cover cars of other railroad companies which came into the possession of the assured, to be by it transferred and stored in consideration of certain charges made. The cars in question here came to the possession of appellee in its business of transferring the cars of other railway companies.

The only remaining question is as to the admission and exclusion of certain evidence, and that the proof of the amount of loss is insufficient. We have considered each of appellant's contentions in these respects, and are of opinion none of them present any reversible error. It would needlessly extend this opinion to discuss them in detail.

The judgment is affirmed.

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**Bayard Stockton and LeRoy H. Anderson, Trustees for
the Children of Sarah J. Conover, v. Peter
Fortune et al.**

1. *PAYMENT--To Agents Without Authority.*—As a general rule, in the payment before maturity of a debt secured or evidenced by a written instrument, the possession of such instrument by the alleged agent is indispensable evidence of his authority to receive payment thereon in order to enable the debtor paying to rely upon appearances of authority in the absence of an actual authority established.

2. *ESTOPPEL—Of Principal to Deny the Authority of His Agent.*—In

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order to protect himself, a debtor who has relied upon appearances of an agency and seeks thereby to estop the alleged principal from denying the agency, it is sufficient for the purposes of this case, to say that the fact that the instruments in question were in the hands of the principal and not in the possession of the agent at all, is controlling.

Foreclosure, of trust deeds. Trial in the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Hearing and decree for defendant; appeal by complainants. Heard in this court at the October term, 1898. Reversed and remanded with directions. Opinion filed April 17, 1899.

Statement of the Case.—This suit was begun by a bill of complaint filed by appellants to foreclose two trust deeds, given to secure notes made by Mrs. Emma A. Leahy to appellants, and conveying property now owned by appellee Peter Fortune.

Some time after Mrs. Leahy had executed the trust deeds in question, she conveyed the property to appellee Fortune, and at the time of this purchase and sale, appellee Fortune paid to one Isaac E. Adams the entire amount of the purchase price, part of which Adams pretended to receive as agent of appellants, holders of the trust deed securities, and part as attorney in fact of Mrs. Leahy, the grantor of the fee. Adams, as trustee, released the trust deeds in question. Adams appropriated to his own use the moneys paid to him by appellees to take up the notes and pay the indebtedness in question. The notes had not then matured.

The only question in controversy is as to the authority of Adams to collect the trust deed indebtedness for appellants, and to release the trust deeds. In other words, the controversy is as to whether the payment by appellee Fortune, to Adams, was effective as a payment to appellants. The promissory notes secured by the trust deeds, and which evidenced the indebtedness in question, were not due by their terms, and were not in the possession of Adams at the time of the payment to him by Fortune of the amount of indebtedness which the notes represented. The notes were in the possession of appellants, and had been continuously in their possession since the making of the loans to Mrs. Leahy.

As tending to show the agency of Adams and his authority to collect the indebtedness represented by these notes, a series of letters, constituting a correspondence between Adams and appellants, was introduced in evidence. The only material evidence as to the authority of Adams consists of this correspondence and the testimony of Hamilton and appellants. The master in chancery, to whom the cause was referred to hear evidence and report conclusions, found that Adams was not authorized to accept payment for appellants, and recommended a decree for appellants, the complainants in the bill to foreclose. The trial court sustained exceptions to the report of the master in chancery, and entered a decree dismissing the bill of complaint of appellants for want of equity. From that decree this appeal is prosecuted.

MONTGOMERY & HAET, attorneys for appellants; HATCH & RITSHER, of counsel.

Possession of the securities is, in the absence of actual authority, or a known course of dealing, indispensable evidence of authority to receive the principal of the debt. Stiger et al. v. Bent, 111 Ill. 328; Henn v. Conisby, Cases in Chancery, 93; Wolstenholm v. Davies, Freeman Ch., 289; Frank et al. v. Tuozzo et al., 50 N. Y. Sup. 71; Williams v. Walker, 2 Sand. Ch. 359; Cooley v. Willard et al., 34 Ill. 68; Garrels v. Morton et al., 26 Ill. App. 433; Viskocil v. Doktor et al., 27 Ill. App. 233; Smith et al. v. Hall, 19 Ill. App. 17; Thompson et al. v. Elliot, 73 Ill. 221; Thornton et al. v. Lawther et al., 67 Ill. App. 214, 169 Ill. 228

A release of a trust deed by the trustee when the note thereby secured has not been paid to the owner of it, and such owner has not authorized it, has no effect as between the parties or subsequent purchasers with notice. Stiger et al. v. Bent, *supra*; Conn. Gen. Life Ins. Co. v. Eldredge, 102 U. S. 545.

FREDERICK S. BAKER, attorney for appellees, contended that the principal will be bound by payment to his agent before

maturity, if from the course of dealing between him and his agent it can reasonably be inferred that it was intended that he was to have such authority. *Thompson v. Elliot*, 73 Ill. 221.

If the evidence shows that the agent was the general agent of the mortgagee to accept payments of principal and interest upon loans negotiated by the agent, the mortgagee will be bound by a payment made to the agent. *Security Co. v. Richardson*, 33 Fed. Rep. 16; *Kent v. Congdon*, 33 Fed. Rep. 228; *Verdine v. Olney*, 77 Mich. 310, 43 N. W. Rep. 975.

The first case is in many respects a parallel case with the case at bar. *Security Co. v. Richardson*, 33 Fed. Rep. 16.

MR. JUSTICE SEARS delivered the opinion of the court.

In order to hold that the payment by appellee to Adams was effective as a payment to appellants, it must be found either that Adams was in fact authorized by appellants to receive the payment, or that he was put in such apparent authority by acts of appellants as would preclude them from now denying his authority.

In passing upon the first question, viz., whether Adams was in fact authorized by appellants to receive this payment, we have to consider two questions: first, whether the receiving of the payment was within the scope of any general agency of Adams; and, secondly, if not, whether there was any specific authorization to do this particular act.

It would seem to be clear and undisputed from all the evidence, that there existed no general agency by which Adams was empowered to receive on behalf of appellants, payments like the one in question. Hamilton, who was the law partner of Adams, testified that he "thought" Adams was the agent of appellants, and described the method of business between Adams and appellants:

"The business relations consisted in the making of loans and in collecting interest, and all the incidents of that business; the examination of titles, reporting on values, executing the loans and obtaining money from Stockton and Anderson (appellants), and delivering it to the borrowers; collecting

the coupons for interest and forwarding it to Stockton and Anderson. * * * My recollection is that when a loan was maturing, if it was desired to renew it, Stockton and Anderson were simply informed of that fact, and they agreed or not, as they might choose. * * * After the completion of the loans, the abstract of title and opinion and the trust deed recorded and the estimate of the value and the report on the property, if such a report had not been forwarded before, were put together, and usually I think a draft with them or inclosed in another cover at the same time were forwarded to Stockton and Anderson, and the notes doubtless also. Doubtless the trust deed may have been forwarded at a date later than the notes sometimes. My recollection is, though, that the trust deeds and notes were taken and signed first, and put on record, and then the abstract was brought down and examined. * * * As to whether the draft upon Stockton, which I referred to, was in his hands, together with all the securities, before the money was paid him, I think that was the way the money was almost always obtained; by draft on Stockton and Anderson, drawn by Adams, either accompanying or following the papers relating to the loan."

Hamilton also testified to the contents of a letter from appellants, in which it was stated that Adams personally, and not the firm of Adams & Hamilton, represented appellants.

Appellants testified, and each of them denied that Adams was their agent. The substance of the testimony of each is to the effect that Adams merely presented loans to them, which they accepted when they so chose.

Without discussing the very lengthy correspondence between Adams and appellants, it is enough to say that it does not disclose any general agency which embraced within its scope the accepting on behalf of appellants of payments of loans before maturity.

One letter from Adams to appellants specifically negatives the existence of any such power. The letter is dated October 10, 1889, and contains, among other matters, the following, referring to the loan in question :

"Mrs. Leahy has been made an offer for her property, and buyer desires to pay cash. I have stated that without

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your consent I have no power to release, but that I would lay the matter before you."

After a careful examination of all the evidence, it seems to us conclusive that Adams was not empowered by any general agency to accept payment of loans before maturity and release securities upon same. Nor is there any evidence which we regard as establishing a specific authority in this particular instance to receive the amount of this indebtedness or to release the security of the same. The only evidence bearing upon the question of such specific authority is contained in the correspondence. The following letters are relied upon by appellees as indicating that appellants authorized Adams to receive this money and release the trust deeds. In the letter referred to, of October 10, 1889, Adams submitted to Stockton the proposal to accept payment of this loan before its maturity. In a reply thereto, dated October 12th, Stockton said, "We would prefer not to release the Leahy mortgage unless our action would be productive of real, substantial loss to her." In a letter dated October 14th, Adams again referred to the subject, as follows: "We will refer your answer to Mrs. Leahy." On November 20th, Adams again wrote:

"Have you the abstracts for the Leahy loan, corner Wood and Madison streets? If so, will you please forward the same immediately? Mrs. Leahy will probably sell the property. As to taking up the loans existing on the same, we have tried to arrange to let them lie, but we can not yet state. We have in hand two or three very good applications for loans which we will hold and have in readiness in case it should be necessary to take the money up, if you should desire to replace it here as well as to make the \$12,000 Seeberger money coming in in December."

On November 22d, Stockton replied:

"We send Mrs. Leahy's abstract by express to-day, and hope that you can arrange that the loan shall remain without change."

On November 23d, Adams wrote:

"In view of uses to which the proposed purchaser proposes to make the Leahy property, corner of Wood and

Madison streets, Mrs. Leahy is obliged to request the clearance of the \$10,000 loans upon the same. We both tried to arrange otherwise, but the sale—which she thinks she ought to make—depends upon this being done. Mrs. Leahy will pay interest to date of reinvestment, and I have assured her, in the light of your last favor on this subject, that I thought you would consent to release, though you did not like to do it. If you have not forwarded her abstracts, will you please do so.

Will you please advise me whether or not I shall arrange for reinvestment here.

On account of above, and the approaching Seeberger payment of \$12,000, I enclose at once three applications which are worthy of consideration."

On November 26th, Adams wrote:

"I this date received abstract of title to property of E. A. Leahy, corner Wood and Madison streets, Chicago. I enclose receipt signed.

I expect to advise you definitely about the sale, etc., if it occurs, the latter part of this week, or early the coming week."

On November 28th, Stockton wrote:

"I telegraphed you yesterday from New York that all the money we wished to invest in Chicago was what would be received from the Leahy loan. We will also invest there the amount of Seeberger loan when we get it. We would prefer one or two mortgages, not more; and would like the land to be situated as nearly central as possible, *i. e.*, not suburban. With these considerations in view I think you will be able to recommend to us what applications in your letter of the 23d November, we had better take, or whether we had better wait for further applications.

We do not see our way clear to making the large loan you mention in your letter of the 25th. Your letter of the 26th enclosing receipt for abstract is also received."

On November 30th, Adams wrote:

"I have received your favor of the 28th of November and note your expression in regard to Seeberger and Leahy money. I will carefully personally examine the applications that have been made the first of the week and will then advise you how I think the money had better be divided up. All the loans presented are good, but which of all had better be taken I will reserve until my next letter.

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At the same time I will give you date when Leahy money will be ready for your order and ask you at that time to forward note, trust deed, etc., in your possession."

If there was any specific authorization to Adams to accept payment of this loan and release the trust deeds before receiving the securities from appellants it must be found in the foregoing correspondence, for there is no other evidence tending to establish it. We examine the correspondence for the purpose of determining its effect as establishing the actual relationship between Adams and appellants and the authority actually given without any reference to what the effect might have been, had it been brought to the notice of appellee before he made payment to Adams. It does not appear from the evidence that any one of these letters was ever brought to the knowledge of appellee until after he had made the payment in question.

As between appellants and Adams it is apparent that an understanding was reached that appellants would consent to accept payment before maturity of the loans in question, but it is not apparent that such payment was to be made to Adams and without an exchange by appellants of securities for money. On the contrary, the last letter of Adams indicates that the money was, at some future time, when ready, to be subject to the order of appellants when they should send on the securities. Although the reinvestment of the money was discussed, it does not appear that any departure from the usual method was adopted, and the entire correspondence is consistent with the regular method of procedure as testified to by Hamilton, viz., that the money would be reinvested upon some loan by honoring the draft of Adams for the amount thereof when the draft should reach appellants accompanied by securities, opinion of title, etc.

From all the correspondence appellants had the right to presume that the indebtedness would not be paid until they should send on their securities to be exchanged for the money. There is nothing in the correspondence which, in our opinion, warrants a different conclusion.

It remains, then, to inquire if appellee was put in a position by any act of appellants, whereby he was entitled to

rely upon an authorization as existing, although it did not in fact exist.

The only evidence bearing upon this question consists of the testimony of William J. English, Esq., who acted as the attorney at law of appellee in the closing up of the transaction, in the course of which the payment by appellee Fortune to Adams was made. Mr. English testified, among other things relating to the transaction, as follows:

“Q. After examining the letter of September 28, 1888, which has been offered in evidence, do you conclude that that is the letter shown you by Mr. Adams on the occasion to which you have testified, when he presented the release for your acknowledgment? A. I think that was one of the letters, yes.

Q. Have you been able to ascertain what other letters were offered or shown to you at that time? A. No, I have not, positively.

Q. And are you unable to identify any other letters as having been shown you? A. Yes, I can say that positively. I have an impression that one or two of the letters which appear in this batch was shown to me, but I would not say positively.

Q. But you are not able to identify them? A. No, sir.”

The letter of September 28, 1888, written by Stockton to Adams, is as follows:

“Your letter of the 26th at hand, and contents noted. Mrs. Leahy’s property is appraised at—land alone \$18,000, building \$10,000. There does not seem to be any objection on account of value to increasing the loan to \$8,000 or \$10,000. Part of the Proudfoot money might be used for this purpose if it were not for the difference in the rate of interest. If Mrs. Leahy will pay seven per cent, you have our assent to making this arrangement; or if Mr. Proudfoot will pay Mrs. Leahy the difference. If you can not arrange this matter, let me know, and we will see if something else can be done.”

This letter indicates, if anything, that the specific assent of appellants was required in each particular instance, to any change of investment made by Adams. No other one letter in the series of correspondence is shown to have been brought to the knowledge of English, so that there can

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arise no question as to any false impression given to English, and through him to appellee, by the letters of appellants.

The further testimony of Mr. English shows very clearly that it was not the letters of appellants, but the false statements of Adams, upon which English and appellee Fortune placed their reliance.

"I asked for the notes which were secured by the trust deeds which these release deeds released; that is what I mean to say, and he stated to me that he had been very much pressed with business in anticipation of his going away to Boston, and that he had made a search in his office for them; that he had supposed surely that they were in his office, but had not been able to lay his hands on them; that they were mislaid; that he had looked for them before—several days before, and not finding them, in order to be sure about it, he had written to Messrs. Stockton and Anderson that if they had them to send them on, because, as he had informed them, that Mr. Fortune had required the obtaining of the property clear of all mortgage, and that he had received a letter from Mr. Anderson stating that Mr. Stockton was not there at present, but was expected on the very day that he wrote, and that he himself didn't know where they were, and if they were there that he would have Mr. Stockton send them on just as soon as he returned that day. Mr. Adams said that if they had them they would be on that afternoon mail, or at the latest, he supposed, in the morning, and that he would send them over, or have his partner, Mr. Hamilton, do so, as he himself had purchased his ticket and sleeper for the evening train for Boston with his wife, and that his wife was outside the door in a cab at the time, waiting for him to complete this matter, and he stated that he was pretty sure they were in his office, but were simply mislaid, and that his dealings, as he had told me before, with Stockton and Anderson were—that is, they were jointly interested in the investments and so forth, and they really owed him quite a large amount of money, and the notes were sometimes left in his office and sometimes in theirs, and just where that one was at that time, he was not perfectly sure, but he was really the owner of the amount at the time, because he had advanced them so much, and he said that was unfortunately the way it was, and Mr. Fortune asked me what I thought about it from what he said, and I said I knew Mr. Adams as a reputable lawyer

and apparently well off, and standing high socially, and if I was dealing with him on my own matter I should certainly suppose that what he stated was true, but, of course, it was a matter of business purely, but that I should myself take my chances on it; and Mr. Fortune then made out a check and gave it to him, and the transaction was completed."

* * * * *

"Q. You said in your testimony that he stated on that occasion that he had received a letter from Mr. Anderson?

A. Yes, sir.

Q. Stating that Mr. Stockton was away—did he produce that letter on that occasion? A. I don't think he did; no, sir.

Q. Did you inquire for it? A. No; I don't know whether I inquired for it or not.

Q. You did not call for any writing there from Mr. Adams on that occasion, did you? A. I don't think I did. I had not the slightest question of doubt in regard to his word at that time about it.

Q. And you accepted his statement as truthful? A. I believed his statement at that time; just as I would believe your statement under similar circumstances.

Q. It was your understanding at that time that previous to the payment by Mr. Fortune of the consideration for that property, that the trust deeds and notes which you have were still outstanding, subsisting incumbrances? A. I don't know that I could state that exactly, because he talked in a way as though it was his own anyway, and it didn't make any difference. I gained the impression that he had advanced money for Stockton and Anderson in his deal with them, by which he was really and virtually the owner of those incumbrances."

It seems very apparent that Mr. English and his client, appellee, paid the money to Adams in reliance upon the statement of Adams that he was in fact the owner of the securities to be released, and not in reliance upon any appearance of authority conferred by appellants as owners and principals upon Adams as a mere agent. The statement of Adams, upon which appellee thus relied, viz., that Adams was in part or in whole the real owner of the securities, was absolutely false. Nor is there anything contained in any of the correspondence which would in any degree give color of truth to the falsehood.

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In passing upon the right of appellee to rely upon any appearances of authority, if any such had been brought to his knowledge, it is important to consider the fact that these notes, not yet matured by their terms, were not in the possession of the agent who undertook to accept payment of them.

Many of the early authorities announce, in effect, that in the payment before maturity of debts secured or evidenced by writings, the possession of the securities by the alleged agent is indispensable evidence of authority to receive payment, in order to enable the debtor to rely upon appearances of authority, or in the absence of an actual authority established. *Dunlap's Paley on Agency*, 274; *Jones on Mortgages*, 964; *Wolstenholm v. Davies*, *Freeman's Ch. R.*, 289; *Roberts v. Matthews*, 1 *Vernon*, 150; *Baldwin v. Billingsley*, 2 *Id.* 539; *Curtis v. Dought*, 1 *Molloy*, 487; *Henn v. Conisby*, 1 *Ch. Cases*, 93; *Gerard v. Baker*, *Id.* 94, note; *Williams v. Walker*, 2 *Sandf. Ch.* 325; *Smith v. Kidd*, 68 *N. Y.* 130; *Frank v. Tuozzo*, 50 *N. Y. Supp.* 71; *Wheeler v. Guild*, 20 *Pick.* 545; *Cox v. Cutter*, 28 *N. J. Eq.* 13.

Without going to the extent of holding that under all circumstances the possession of the securities by the ostensible agent would be absolutely indispensable, in order to protect the debtor, who had relied upon appearances of agency, and sought thereby to estop the alleged principal from denying the agency, it is sufficient for the purposes of this case to say that in the absence of anything save the letter of September 28, 1888, done by appellants and relied upon by appellee, which could operate to estop appellants from denying the agency of Adams, we hold that the fact that the notes were in the hands of appellants, and not in the possession of Adams, is controlling. *Cooley v. Willard*, 34 *Ill.* 68; *Garrells v. Morton*, 26 *Ill. App.* 433; *Viskocil v. Doktor*, 27 *Ill. App.* 232.

Finding as we do from the evidence, that Adams had no power within the scope of any general agency to thus accept payment, and that he received no specific authorization so to do, we are also led to the conclusion that there is

no fact established in the evidence, relied upon by appellee in making payment, which operates to estop appellants from setting up the truth as to the authority of Adams.

Many authorities are cited by appellee's counsel which would bear upon the case if the evidence was sufficient to establish a general agency of Adams to receive payment upon all loans made by appellants through his office.

In *Thornton v. Lawther*, 169 Ill. 228, the evidence established a general agency, under which the agent was invested with powers of the broadest scope in managing and disposing of the funds of the principal, without specific direction or authority in each particular investment. The facts in that case warranted the conclusion that the agent was clothed with authority to do anything which the principal might have done in the matter of investment, accepting payment, reinvestment, etc. The actual authority of the agent was established. So also in *Noble v. Nugent*, 89 Ill. 522, the court held that an actual authority to receive payment was established, saying: "The circumstances that the notes were not surrendered, as against clear proof that they were paid to a person having authority to receive payment, amounts to nothing."

And in *Security Co. v. Richardson*, 33 Fed. Rep. 16, the court evidently reached the conclusion that the agent was actually authorized to receive the payment there in question. The court said: "That Bolles recognized and treated Creighton as his general agent, having charge over the investments made, with power to demand and receive payment of the principal and interest thereof, is the only reasonable conclusion deducible from the correspondence and the acts of the parties."

But in the case under consideration no such actual authority is established. Nor is it contended by counsel that there was any power in Adams under any such general agency as obtained in the *Lawther* case and others cited. In the opinion of the trial court, which is made part of the several briefs of counsel, it is clearly indicated that the court found that no such authority existed, unless spe-

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cifically conferred for this particular transaction. Therefore the cases above considered do not apply and can not control.

We are of the opinion that the conclusions of the master in chancery before whom this cause was heard, were correct.

The decree is reversed and the cause is remanded, with directions to enter a decree in conformity with the report and recommendation of the master in chancery. Reversed and remanded with directions.

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82	285
93	* 27
82	285
198	* 644

1. **OPTION CONTRACTS—*What Are.***—A contract to give another the option to sell or buy any commodity at a future time is an option contract and void.

2. **SAME—*What is Not a Gambling Contract.***—The court states the contract in this case and holds that it is not within the prohibition of Section 130 of the Criminal Code.

3. **STATUTES—*Rule of Interpretation.***—A thing within the intention is within the statute, though not within the letter, and a thing within the letter is not within the statute unless within the intention.

4. **ADMINISTRATION OF ESTATES—*Presentation of Claims Against.***—Sec. 70, Chap. 3, R. S., entitled "Administration of Estates," providing for the presentation of claims within two years from the granting of letters testamentary or of administration, is not a general statute of limitations taking away all remedy, but a specific act adopted for the particular purpose of facilitating the early settlement of estates.

5. **SAME—*Construction of Sec. 70, Chap. 3, R. S. "Limitations."***—A claim against the estate of a deceased person is not absolutely barred if not presented within two years, but simply the right to claim a distributive share in, or any partition out of, the property already inventoried.

6. **SAME—*Claims Presented after the Expiration of Two Years.***—Under proper pleadings a plaintiff has a right to have a claim against the estate of a deceased person not presented until after the expiration of two years from the granting of letters, passed on by the court, and a judgment for the amount due, if anything, to be satisfied out of any estate that may afterward be found not inventoried or accounted for by the administrator.

7. **SAME—*Effect of Pleading the Two Years Limitation.***—If the defendant be successful on the plea of the two years statute, the court

in the event of a recovery by the plaintiff, will give judgment payable out of subsequently discovered estate not inventoried or accounted for by the administrator or executor, as the case may be.

Assumpsit, for breach of written contract. Trial in the Superior Court of Cook County, the Hon. SAMUEL C. STOUGH, Judge, presiding. Judgment for defendant; appeal by plaintiff. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed April 17, 1899.

MCGLOSSON & BEITLER, and JAMES R. WARD, attorneys for appellant, contended that the contract in question is not within the prohibition of Sec. 130 of the Criminal Code. What the law prohibits, and what is deemed detrimental to the public, is the speculation in differences in market values, called, in the peculiar language of the dealers, "puts and calls," which simply means a privilege to deliver or receive the grain or not, at the seller's or buyer's option. It is against such fictitious, gambling transactions, we apprehend the penalties of the law were aimed. *Wolcott v. Heath*, 78 Ill. 437.

"The intention of the parties gives character to the transaction, and if either party contracted in good faith, he is entitled to the benefit of his contract, no matter what may have been the secret intention or purpose of the other party." *Pixley v. Boynton*, 79 Ill. 353.

Optional contracts, in this sense, are usually made by adjusting market values as the parties having the option may elect. It is simply a mode adopted for speculating in differences in the market value of grain and other commodities; it must have been in this sense the term option is used in the statute. Such a contract is fictitious, having none of the elements of good faith, as in a contract where both parties are bound. And, referring to the option in that case, the court said: "They contracted for the privilege of dealing in options, and settled with them on the differences as indicated or determined by the fluctuations of the market." *Pearce v. Foot*, 113 Ill. 234.

The actual intention of the parties is what the law requires shall be ascertained, and inasmuch as Section 130, Chapter 38, of the Criminal Code, is a highly penal statute,

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the intention of the parties to violate it must be clearly established before there can be an adjudication, either in a civil or a criminal proceeding, visiting the penalties of that statute upon the parties, and casting upon them the legal consequences of a violation of its provisions. *People v. Fesler*, 145 Ill. 155.

FLOWER, SMITH & MUSGRAVE, attorneys for appellees.

The portion of the agreement under which recovery is sought in the first three counts is an option contract and void. *Rev. Stat.*, Chap. 38, Sec. 130; *Corcoran v. Coal Company*, 37 Ill. App. 577, 138 Ill. 390; *Schneider v. Turner*, 27 Ill. App. 220, 130 Ill. 23; *Kerting v. Hilton*, 51 Ill. App. 437, 152 Ill. 658; *Locke v. Towler*, 41 Ill. App. 66; *Champion v. Smith*, 46 Ill. App. 501.

The first three counts are bad because they allege breaches of obligations not limited to Preston's lifetime, and which were terminated by his death. *Preston v. Smith*, 67 Ill. App. 613, 170 Ill. 179.

There was no error in overruling the demurrer of the plaintiff to the defendant's plea to the fourth amended count, and in dismissing the suit. *Judy v. Kelley*, 11 Ill. 211; *Ryan v. Jones*, 15 Ill. 1; *Darling v. McDonald*, 101 Ill. 370.

MR. JUSTICE ADAMS delivered the opinion of the court.

This was an action of assumpsit by appellant against Ellen H. Preston, executrix, and John L. Preston and Alfred R. Edwards, executors of the estate of E. B. Preston, deceased, upon certain clauses of the following contract:

"This agreement entered into between C. L. Smith, of Cleveland, Ohio, and E. B. Preston & Co., of Chicago, Illinois.

From the date above mentioned, the said C. L. Smith agrees to give said E. B. Preston & Co. the exclusive right of manufacturing and selling a certain improved hose attachment and swivel, patented August 20, 1889, patent No. 409,512, and that he has not disposed of any right, or portion of right, to any other person previous to this agreement.

E. B. Preston agrees to furnish C. L. Smith with what his wants may be of this hose attachment, of any size manufactured, at a margin of twenty per cent above cost. Said cost to be agreed upon, and he shall retain the right to sell these goods at market price agreed upon between him and said E. B. Preston & Co.

It is mutually agreed that E. B. Preston & Co. shall push the sale of this swivel by advertising, exhibiting, and soliciting trade by their traveling salesmen, or by other employes; shall keep at all times in stock such quantities as will supply the market for demand, and to use their best efforts to create a large demand and heavy sale of this article.

Said E. B. Preston & Co. further agree that the royalty paid to said C. L. Smith shall equal at least four hundred and fifty dollars (\$450) per annum. In case they do not reach this amount, this agreement can be canceled by C. L. Smith, and a new one made that will be satisfactory to him.

The said E. B. Preston & Co. further agree to pay C. L. Smith on or before the 15th of each month following the sales of said hydrant-swivel, a royalty of fifty cents per dozen on all three-fourth hydrant-swivels sold. If any larger size be manufactured hereafter, a price in royalty will be made that will be satisfactory.

Said E. B. Preston & Co. will furnish said C. L. Smith with statements of sales of this swivel, with sales of each size, and E. B. Preston & Co.'s books shall be open to C. L. Smith at any and all times covering sales of this swivel.

Signed this 11th day of September, 1891.

E. B. PRESTON & Co.,

By C. E. Jenkins, Mgr.

C. L. SMITH."

The declaration contains four counts. The first, second and third counts are based upon breaches of the following paragraph of the contract:

"E. B. Preston agrees to furnish C. L. Smith with what his wants may be of this hose attachment, of any size manufactured, at a margin of twenty per cent above cost; said cost to be agreed upon, and he shall retain the right to sell these goods at the market price agreed upon between him and the said E. B. Preston."

The fourth count is based upon breaches of the following paragraph of the contract:

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"It is mutually agreed that E. B. Preston & Co. shall further the sale of this swivel, by advertisement, soliciting trade by their traveling salesmen, or other employes, and shall keep at all times in stock such quantities as will supply the market for demand, and to use their best endeavors to create a large demand and a heavy sale of this article."

It is averred in each of the counts that E. B. Preston conducted business at Chicago, Illinois, under the firm name and style of E. B. Preston & Co.; that said firm consisted solely of E. B. Preston; that E. B. Preston and appellant executed the contract September 11, 1891; and in the first, second and third counts, that appellant and E. B. Preston, on September 11, 1891, agreed upon the cost price of said hose attachment and swivel, and fixed the rate at \$2 per dozen, and the price at which appellant had the right to sell the same at \$3.50 per dozen, and that the demands of appellant in transacting his business required 9,000 dozen during the unexpired term of said patent, to wit, fifteen years, or 600 dozen per year for the period of fifteen years, and that E. B. Preston agreed to sell and deliver said quantity of hose attachments to appellant upon demand, for \$2.40 per dozen, to be paid for upon delivery, but refused and neglected to do so.

In the fourth count, it is averred that E. B. Preston failed and neglected to push the sale of said swivel by advertising, exhibiting, and soliciting trade by his salesmen and other employes, and to keep at all times in stock such quantity as would supply the market for demand, and failed and neglected to use his best efforts to create a heavy sale of said swivel, whereby the appellant, being owner of said patent, subject to said agreement, and having a large business, and relying upon the faithful performance of said contract by said Preston, was deprived of great gains and profits.

It is averred in the declaration that E. B. Preston died testate, April 27, 1895, and that letters testamentary were issued May 8, 1895, to appellees.

The breach alleged in the first count is, that E. B. Preston, in violation of his agreement, refused to sell and deliver to appellant for the sum of \$2.40 per dozen, 9,000

dozen hose attachments after the date of said agreement, upon demand, and at the places specified by appellant, to be paid for upon delivery.

The breach alleged in the second count is, that E. B. Preston, in violation of his agreement, refused to sell and deliver to appellant for the sum of \$2.40 per dozen, 600 dozen hose attachments per year, during the life of a certain patent, to wit, fifteen years from the date of said agreement, to be paid for upon delivery.

The breach alleged in the third count is, that E. B. Preston, on the 10th day of November, 1894, wrongfully refused to carry out his agreement, and refused to sell and deliver to appellant 9,000 dozen of hose attachments for \$2.40 per dozen, on demand, at the places designated by him.

The breach alleged in the fourth count is, that E. B. Preston, after September 11, 1891, wrongfully failed and neglected to push the sale of said swivels, by advertising and soliciting trade by his salesmen and other employes, and to keep at all times in stock such quantities as would supply the market for demand, and neglected to use his best efforts to create a large demand and heavy sale of said articles, whereby appellant, being the owner of said patent subject to said agreement, was deprived of large gains and profits.

Counsel for appellees resorted to the ancient and obsolete method of demurring *ore tenus* to each of the first three counts, which seems to have been by consent, as no objection on that ground is made by appellant's counsel. Inasmuch as we are not informed by the record what counsel said in so demurring, we must, in accordance with a well settled rule, assume, as against appellees, that the demurrer was general. The demurrer to the first three counts was sustained by the court, and appellant elected to stand by his demurrer.

Appellees pleaded to the fourth count. Appellant demurred to the plea generally and specially; the court overruled his demurrer, he elected to stand by it, and judgment was rendered for appellees.

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The questions for decision are whether the court erred in sustaining appellees' demurrer to the first, second and third counts, and in overruling appellant's demurrer to appellees' plea to the fourth count.

The chief point relied on by appellees in support of their demurrer to the first three counts of the declaration is, that the part of the contract relied on in those counts, viz., that in which Preston agreed to furnish appellant with what his wants might be of the hose attachment, is "a pure option contract." In *Smith v. Preston*, 170 Ill. 179, the court, commenting on the contract in question, say: "The contract is not severable. All its parts must be construed together." We think it obvious that the part of the contract on which the first three counts are based can not be regarded a distinct and independent contract. By the contract, appellant granted to E. B. Preston, under the name of E. B. Preston & Co., the exclusive right to manufacture and sell the patented hose attachment and swivel, and Preston agreed, among other things, to furnish appellant with what his wants might be of the hose attachment and swivel, of any size manufactured, at a margin of twenty per cent above cost. This agreement of Preston was part of the consideration for the grant to him by appellant, in the absence of which, doubtless, the grant would not have been made, because it is clear from the contract that Smith, himself, intended to engage in the business of selling the patented article. In this respect the contract is analogous to the one in question in *Wolf v. National Bank of Illinois*, 178 Ill. 85. In that case Wolf refused to purchase certain bonds unless the bank would contract in writing to repurchase them. The bonds were sold to Wolf at different times between June 22, 1896, and July 15, 1896, both dates inclusive, and at the date of each sale of bonds the bank gave to Wolf a writing, signed by its vice-president, stating in substance that if he, Wolf, wished to sell the bonds back to the bank in the month of January, 1897, the bank would pay for them par and interest. The case was certainly as strong, and, as we think, a stronger one for the bank, in support of the propo-

sition that the contract, in so far as it related to the resale to the bank, was an option contract, than is the present case in support of the proposition that the clause in question of the contract between appellant and Preston is an option contract. Yet the court held that on Wolf offering, in January, 1897, to resell the bonds to the bank at their face value and accrued interest, the bank was bound to purchase them.

By the agreement, Preston was to furnish the hose attachment to appellant at twenty per cent above cost, and the agreement contains the following: "Said cost to be agreed upon, and he shall retain the right to sell these goods at market price agreed upon between him and said E. B. Preston & Co." In each of the first three counts of the declaration it is averred that at the date of the contract it was agreed between appellant and E. B. Preston & Co. that the cost price of the hose attachment and swivel would be \$2 per dozen, and the market price \$3.50 per dozen. This is a material averment, and is admitted by the demurrer, and must be assumed to be true.

We are of opinion, both on the authority of *Wolf v. National Bank of Illinois, supra*, and also independently of that case, that appellant, by his contract, and by agreeing on the cost of manufacture and the market price at which the manufactured article should be sold, bound himself to purchase from Preston as much of the hose attachment and swivel as his business wants would require, and that Preston was bound by the contract to furnish the same. Appellees' counsel rely, in support of their contention, on Section 130 of the Criminal Code which, in so far as it is applicable to the present case, is as follows:

"Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain or other commodity * * * shall be fined * * * and all contracts made in violation of this section shall be considered gambling contracts, and shall be void."

It is a settled rule, in the interpretation of statutes, that "A thing within the intention is within the statute, though

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not within the letter, and a thing within the letter is not within the statute unless within the intention." *Perry County v. Jefferson County*, 94 Ill. 220; *R. R. Co. v. The People*, 154 Ib. 568.

In *Schneider v. Turner*, 130 Ill. 28, a leading case on the subject, the court say of the section :

"We agree fully with counsel for appellants as to the object of the statute. It manifestly is to break down the pernicious practice of gambling on the market prices of grain and other commodities."

The commodity which is the subject-matter of the contract under consideration is a patented article; the exclusive right to manufacture and sell it is granted by appellant to Preston, except the right of sale reserved to appellant, and Preston agrees to furnish to appellant at an agreed price as much as appellant's business wants may require, and no more. We can not perceive, and counsel for appellees have not suggested how appellant could, in any way, use the contract as a means of gambling. It is not like an option to purchase stocks, bonds, or other securities, or any commodity which the parties might settle by paying differences in market prices. Appellant could purchase no more, at the price agreed on, nor was Preston bound to sell him any more, than his wants required, and, so far as appears, there was no market price for the commodity except that fixed by the parties to the contract.

Appellee's counsel urge that the agreement is to furnish appellant with what his wants may be of the hose attachment; that it has no reference to any business requirements of appellant, and that there is no allegation in the declaration that Preston knew appellant was in business, or that he was in fact in business.

In *Minnesota Lumber Co. v. Coal Co.*, 160 Ill. 85, the contract between the parties commenced thus: "The said Minnesota Lumber Company agrees to buy its requirements of anthracite coal for the season of 1886-1887, upon condition named hereafter, of said Whitebreast Coal Company," etc. It was contended that the contract was want-

ing in certainty and mutuality; but the court said: "The circumstances which both parties had in view at the time of making the contract may be referred to for the purpose of determining the meaning of doubtful expressions," and held that the word "requirements," as used in the contract, evidently meant the amount or quantity of coal which the lumber company would need in its business for the specified season. The words "what his wants may be," in the contract in question, are equivalent to the words, "his requirements," and it is evident, from the contract, that what the parties had in view, was that appellant should be furnished with as much of the hose attachment as his business of selling the same in the market would require. That appellant intended to engage in the sale of the hose attachment is sufficiently disclosed by the contract, which is set out in each of the first, second and third counts, and must, therefore, have been known to appellees.

Appellees' counsel further object to the second count on the alleged ground that it seeks to charge the executors, and to the first and third counts, "because they do not confine the wants and requirements of the plaintiff and the obligations of Preston to manufacture and deliver, and the damages resulting, to the lifetime of Preston." The second count contains no averment seeking to charge appellees; it merely avers a demand on them. The first and third counts, by necessary implication at least, aver obligations and claim damages extending beyond the lifetime of Preston, which are not recoverable. *Smith v. Preston*, 170 Ill. 179.

The demand on appellees and the averments referred to, may be regarded as surplusage, and *utile per inutile non vitiatur*. Besides, surplusage can not be reached by demurrer. 1 Chitty's Pl., 9th Am. Ed., 229.

The plea of appellees to the fourth count commences thus:

"And the defendant, by Flower, Smith & Musgrave, their attorneys, come and defend the wrong and injury, when, etc., and say that the plaintiff ought not, by reason of anything in the additional count filed herein April

19, 1898, to have his aforesaid action against them, because," etc.

The plea, then, goes on to aver, in substance, that E. B. Preston died April 27, 1895; that letters testamentary were issued to the appellees May 8, 1895; that due notice of the time for filing and adjusting claim was given; that, prior to December 24, 1895, appellant presented his claim for royalty under the contract in question, and that such proceedings were had (stating them in detail) that, finally, his claim, to the amount of \$207.91, was adjudged to be paid in due course of administration, and that no other claim was ever filed or exhibited against Preston's estate, and no suit was ever begun by him against appellees, except the present one. The plea thus concludes:

"And the defendants aver that, by reason of the premises, the cause of action in said additional count last named is barred by the statute of limitations in such case made and provided. And this the defendants are ready to verify; wherefore, they pray judgment," etc.

Appellant demurred generally and specially to this plea.

The statute relied on by appellees in their plea is Section 70 of Chapter 3, Rev. Stat., which provides: "All demands not exhibited, as aforesaid" (meaning within two years from the granting of letters testamentary or of administration) "shall be forever barred, unless the creditors shall find other estate of the deceased, not inventoried or accounted for by the executor or administrator, in which case their claims shall be paid *pro rata* out of such subsequently discovered estate," etc. This clause quoted is the same as in Section 115 of the former Statute of Wills, Rev. Stat., 1845, p. 561, and has been construed by the Supreme Court in numerous cases: *Thorn v. Watson*, 5 Gilm. 26; *Judy et al. v. Kelly*, 11 Ill. 211; *Russell v. Hubbard*, 59 Ib. 335; *Shepard v. Nat. Bank*, 67 Ib. 292; *Darling v. McDonald*, 101 Ib. 370; *Snydacker v. Swan*, 154 Ib. 220; *Waughop v. Bartlett*, 165 Ib. 124.

In *Waughop v. Bartlett* the court say:

"The section of the statute relating to the presentation of claims against the estate of a deceased person, is not a

general statute of limitations taking away all remedy, both personal and against the property of a person deceased. It is a specific act adopted for the particular purpose of facilitating the early settlement of estates. This court said in *Peacock v. Haven*, 22 Ill. 23: 'As we understand that section, and as it has been construed by this court, and its plain language seems to import, a claim is not barred if not presented within two years, but simply the right to claim a distributive share in, or any partition out of, the property actually inventoried.'

In *Peacock v. Haven*, *supra*, the precise question was whether the claim was absolutely barred by the statute, and the court held that it was not, and the judgment was reversed for the reason that the trial court held a replication, which set up the statute as a bar to a plea of set-off, good.

There is evidently a mistake in the report of the opinion. The court is made to say: "By sustaining the demurrer, the court decided it was an absolute bar, and in this erred." For the word "demurrer" should be substituted replication, because the trial court sustained the replication, as the report shows, and it was the replication which pleaded the statute in bar.

The plea is in bar to the action, and therefore bad. Appellees object that it was incumbent on appellant, either to allege in his fourth count, or reply to the plea of appellees, subsequently discovered assets. The plea being bad, appellant properly demurred to it, and it was not necessary for appellant to aver subsequently discovered assets in his declaration, for the reason that, on proof of his claim, he will be entitled to judgment, even though assets may never be discovered beyond those inventoried.

In *Thorn v. Watson*, *supra*, the court say:

"Under the issues of *non-assumpsit* and set-off, the plaintiff had the right to have his claim passed on by the court, and a judgment presently for the amount due, if anything, to be satisfied out of any estate that might *afterwards* be found not inventoried or accounted for by the administrator."

The only effect of a plea of section 70 of the statute is,

Bartling v. Thielman.

that if the defendants be successful on the plea, the court, in the event of a recovery by the plaintiff, will not give judgment to be paid in due course of administration, but only judgment payable out of subsequently discovered estate not inventoried or accounted for by the administrator, or executor, as the case may be. R. S., Ch. 3, Sec. 70; Darling v. McDonald, *supra*, 374.

We do not agree with counsel for appellant, that a plea of section 70 of the statute is improper. It is proper when necessary, but not in bar of the action. A proper conclusion of such a plea will be found in Snyder v. Swan, 154 Ill. 220. It is not apparent in the present case, that the plea was necessary. The date of the issuance of letters testamentary is stated in the count pleaded to; the filing indorsement shows when the count was filed, and inspection and comparison of it with the first three counts will enable the court to determine whether it states a different cause of action from any stated in those counts. It would seem to be sufficient to call the attention of the court to the record.

It was error to sustain appellees' demurrer to the first three counts and to overrule appellant's demurrer to appellees' plea. The judgment will be reversed and the cause remanded.

82 297
1898 88

Henry C. Bartling v. Christian Thielman.

1. REHEARING—*Sufficient Cause for.*—The fact that the assignment of errors as contained in the abstract of the record, differs materially from the assignment of errors upon the record is a sufficient cause for a rehearing where the attention of the court is not called to it upon the original hearing of the case.

Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard on a motion for a rehearing in the Branch Appellate Court at the October term, 1898. Original opinion adhered to, Opinion filed May 2, 1899.

RALPH R. CROCKER and RICHARD H. TOWNE, attorneys for appellant.

MASTERTON & HAFT, attorneys for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

In this case a rehearing was allowed upon the petition of appellant. Upon a re-examination of the case, and after full consideration of the petition for a rehearing and the answer thereto, we adhere to our former opinion, including the directions therein contained to the trial court.

In the answer to the petition for a rehearing, our attention is called to the fact that the assignment of errors, as contained in the abstract of the record, differs materially from the assignment of errors upon the record itself. In the abstract of the record filed by the attorneys for appellant, it appears that there were eleven errors assigned upon the record. Turning to the record, we find there were but five. In other words, in the abstract of record, six alleged errors appear in the "assignment of errors" which do not appear upon the record. What we might have said or done had our attention been called to this upon the original hearing, is now immaterial. But if there were no other reason for declining to change our former opinion, this practical interpolation of additional errors is sufficient, especially as the principal grounds urged in support of the petition are those contained in such additions to the record.

82	296
181	358
82	296
88	300

George A. Seaverns v. George Lischinski.

1. **VERDICTS—Challenging for Insufficiency of the Evidence.**—In order to successfully challenge a verdict, because of the insufficiency of the evidence to sustain it, the bill of exceptions must contain all the evidence, and must purport to do so.

2. **BILL OF EXCEPTIONS—Physical Objects.**—Where a physical object is admitted in evidence at the trial, but is too bulky and cumbersome to be incorporated into or transmitted with the bill of exceptions, it must contain a complete description of such object.

3. **SAME—When it Does Not Purport to Contain All the Evidence.**—If a bill of exceptions does not state that it contains all the evidence, a court of review will, where the assigned errors question the sufficiency

Seaverns v. Lischinski.

of the evidence to sustain the verdict, presume that the decision of the lower court was justified by evidence not shown, if that shown is not sufficient.

Action in Case, for personal injuries. Trial in the Superior Court of Cook County; the HON. FARLIN Q. BALL, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed May 2, 1899.

JOHN A. POST and O. W. DYNES, attorneys for appellant;
CHARLES B. STAFFORD, of counsel.

FRED H. ATWOOD and FRANK B. PEASE, attorneys for
appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The appellant (defendant below) was the operator of a grain elevator, and the appellee was a laborer in his employ, who, among other things, assisted in moving railroad cars into and out of the elevator.

The cars were hauled to and forth by means of a capstan, with ropes, tackle, etc., operated by steam power. To haul cars out of the elevator upon their appropriate tracks and switches, a sling six or eight feet long, made of rope, was fastened to a timber and the railroad cross ties, at a distance from the capstan of about 120 feet down the track in the direction the cars were to be hauled, and a snatch-block or pulley was hooked to the sling. A rope having one end at the capstan and the other end hitched to the car, passed through the pulley, and being operated from the capstan, drew the cars in the direction of the pulley and sling.

On the day in question, five loaded cars were being hauled out of the elevator in the manner indicated. At a particular point the five cars so being hauled, came up to another five cars previously hauled out of the elevator, and the strain thus becoming too great, caused the sling rope to break. The tension of the hauling rope thus being suddenly relieved, caused the pulley block to fly back down the track in the direction of the cars and

strike appellee upon his legs. Both his legs were broken and greatly bruised, and the free use of his left leg is permanently impaired.

The jury returned a verdict of \$5,000, from which \$2,250 was remitted and judgment was entered for \$2,750.

The theory of the declaration is based upon the master's duty to furnish reasonably safe appliances for the servant to work with and to keep them in reasonably safe condition and repair, and the neglect therein by the master in respect of the sling rope which broke.

The broken rope was introduced in evidence by appellant without objection, but is not attached to the bill of exceptions or in any manner brought to this court, and the point is made that the rope not being before us, there was important evidence before the jury and trial judge that we are unable to see and consider, which may have been of a conclusive character.

And the case of C., B. & Q. R. R. Co. v. Burton, 53 Ill. App. 69, is cited. That was a suit to recover for injuries to the person and horse and wagon of the plaintiff from being run into at a railroad crossing by a passing train of cars. The jury were permitted, upon the request of the railroad company and with the consent of the plaintiff, to go in a body and view the crossing there in question, and the Appellate Court of the Third District, speaking through Mr. Justice Pleasants, held that the jury having had important evidence before them, not preserved in the bill of exceptions, the presumption was that the evidence not preserved warranted the finding. There are other cases that hold the same way. That of N. C. St. R. R. Co. v. Eldridge, 51 Ill. App. 430 (this district), was a suit for personal injuries for an accident to the appellee by being caused to trip or stumble on account of a bolt or something that protruded above the floor of a street car, and by consent of both parties the jury inspected the car, itself, which it was agreed was at the time of inspecting it in the same condition as at the time of the accident. It is said in the opinion of the court:

"What they (the jury) saw, we have no means of knowing and can not review. Whatever, if anything, was lacking in the other evidence to convict the appellant of negligence we must presume was supplied by such inspection. * * * Their (the jury's) finding rests in part at least upon evidence derived from a personal inspection of the bolt in the car itself, which is not before us, but binds us."

The case of *C. & B. Packing Co. v. City of Chicago*, 111 Ill. 651, was an action on the case for damages to property in consequence of the construction of a viaduct. There, an instruction, "that as the parties to this action by mutual consent allowed the jury to view the premises in question and the viaduct, they have the right in finding their verdict to take in account such facts as they learned by viewing the property as to whether," etc., was held to be good, and numerous cases in support of it were cited.

Cases subsequent to that one, but of a similar kind to those there cited, are *Peoria Gas Light & C. Co. v. Peoria T. Ry. Co.*, 146 Ill. 372, and *Sanitary District v. Cullerton*, 147 Ill. 385, in both of which the effect of evidence in the nature of a view or inspection warranted by the statute, but incapable of being brought into a bill of exceptions, is considered.

All of such cases were, however, instances of an inspection by the jury, made out of court.

This is an instance of an inspection of a material object, admitted in evidence and submitted to the jury, in court.

The only reason given by appellant for not making the rope a part of the bill of exceptions, is that "it is too bulky." He makes no argument and cites no authority upon the effect of its absence, and meets the point made by appellee with nothing but a negative argument that there is nothing in evidence to indicate that the rope was not suited to the purpose for which it was used.

It has been the rule in this State, from the earliest, that in order for an appellant to successfully challenge a verdict, because of the insufficiency of the evidence to sustain it, the bill of exceptions must contain all the evidence, and must purport to do so. *Clark v. Willis*, 16 Ill. 61, where earlier

cases are cited; *Garrity v. Hamburger Co.*, 136 Ill. 499; *Legnard v. Rhoades*, 156 Ill. 431; *James v. Dexter*, 113 Ill. 654, and others too numerous to cite.

If there be a rule as to what will take the place, in a bill of exceptions, of a physical object, admitted in evidence at the trial, but too bulky and cumbersome to be incorporated into, or transmitted with, the bill, we have never seen it stated. It would seem that nothing less than a complete description of the object would suffice, and until we learn better, we will hold that such a description is enough. See *Doud v. Guthrie*, 13 Ill. App. 653, on page 661.

It has been our observation, that the most skilled practitioners avoid the introduction of evidence of a merely material or physical kind, in actions of this character, unless it be necessary to enable the jury to fairly understand the spoken testimony. When it is so necessary for the jury to see the object, why is it less necessary for a court of review to see it?

But, continuing, is there, then, in this bill of exceptions, such a description of the rope as enables us to see, in effect, what the jury saw in respect of it? What the jury saw by looking at the rope was, clearly, evidence to be considered by them in connection with the other evidence in the case. *Thompson on Trials*, Sec. 893; *Peoria Gas Light & C. Co. v. Peoria T. Ry. Co.*, *supra*; and *Sanitary District v. Culbertson*, *supra*.

The rope is spoken of by several witnesses, variously, as being six or eight feet long; an inch and a half in diameter when first used; without anything in its appearance to indicate there was any defect in it; good sound rope; splendid new rope; the same kind of rope as that which had been used a long time for the same purpose; like in size and appearance the other rope used in the work; undistinguishable, so far as appearances went, from any other rope of its size; torn in one or two places other than at the fracture, in a manner not accounted for; bruised in some other places, explained as having occurred after the accident, and as tied together in mending it from a previous break in a place different from the present break.

It is manifest that the witnesses who said the rope was new, etc., spoke of it as it was and appeared at the time it was made into the sling, and not at the time of the accident, for it is conceded it was in use and broke about a week before and had been mended, and it was made to appear by appellant's examination of one of his own witnesses, that it was torn in one or two places which he could not account for; and, also, it was proved, without contradiction, to have been in use since, during apart, at least, of the term of employment of an employe who had quit work the previous month.

The record nowhere indicates the material of which the rope was made, whether of hemp, manila, flax, coir, cotton, or other vegetable matter—materials of varying degrees of strength and durability, which all men may be presumed to know are manufactured into rope—or how it had been taken care of in respect of the elements.

But, should it be said that there can be no presumption that the rope was not stricken from the record, because of the certificate of the trial judge to the bill of exceptions, we must look to see what such certificate is.

Imperial Hotel Co. v. Claffin Co., 175 Ill. 119, indicates that because of the certificate of the judge in that case, no presumption either way would be indulged in with reference to a document there given in evidence, but omitted from the bill of exceptions. The certificate of the judge, in that case, contained the words: "which was all the evidence offered in this case by either party."

In the case at bar, at the close of the testimony it is stated: "which is all the testimony offered on the trial of said cause by either party."

Then follow ten pages of instructions, motions and rulings, at the end of which the judge certifies as follows:

"And forasmuch as the matters above set forth do not fully appear of record, the defendant tenders this his bill of exceptions and prays that the same may be signed and sealed by the judge of this court, pursuant to the statute in such case made; which is done accordingly this 23d day of Decr., 1897?"

And the signature and seal of the judge is affixed.

It is said, in Thompson on Trials, Vol. 2, Sec. 2784, in speaking of the necessity of it being made to affirmatively appear that a bill of exceptions contains all the evidence, "It will not be sufficient that it contains a recital that 'this was all the testimony given in the cause,' since the word 'testimony' is not synonymous with evidence," and decisions of the Supreme Court of Indiana are cited to support the text.

That it has always been the law of this State, that if a bill of exceptions does not state that it contains all the evidence, a court of review will, in every case where the assigned errors question the sufficiency of the evidence to sustain the verdict, presume that the decision of the lower court which could be, was justified by evidence not shown, if that shown were not sufficient, we need only to cite *Garrity v. Hamburger, supra*.

But the proposition of Mr. Thompson concerning the distinction to be observed between the words "testimony" and "evidence," used in connection with bills of exception, is, in our opinion, too highly technical to be followed, as a general rule. Those words are often used interchangeably in the practice of this State.

Considering, however, the familiar rule that a bill of exceptions is the pleading of the party who prepares it, and is to be construed most strongly against him (*Crane Co. v. Tierney*, 175 Ill. 79), we think it may well be, that where a bill of exceptions shows upon its face, in the body thereof, that an instrument of physical evidence, such as a material object, which does not accompany the bill, was admitted in evidence, a certificate by the judge that the bill contains all the testimony, should not be construed as overcoming the otherwise affirmatively appearing fact that such omitted instrument was admitted and retained in evidence in the case, nor as giving rise to a controlling presumption of law that the bill does contain all the evidence. And, especially so, in view of the holding in *Garrity v. Hamburger Co., supra*, that the certificate in that case which stated: "This was

Chicago City Ry. Co. v. Smith.

and is all the testimony offered or received upon the trial of said cause by either party," did not overcome what otherwise "affirmatively appeared, from the bill of exceptions, that evidence which probably bore on the question in issue was introduced at the hearing, but was not copied into the bill of exceptions."

From a consideration of all the evidence that the record contains, including everything descriptive of the rope in question, as well as the fact of the omission from the bill of exceptions of the rope itself, we are bound by intendment of law to conclude that the evidence omitted from the record would sufficiently supply whatever is necessary, if anything, to sustain the verdict.

As said in *Bates v. Bulkley*, 2 Gilman, 389, "The fact that the bill of exceptions does not show that it contains all the evidence given on the trial, is conclusive against our reversing the judgment," for insufficiency of evidence to support the verdict.

We must not be understood as acceding to the correctness of the verdict if we were at liberty to consider the merits of the case, upon the partial record before us.

No question of law is argued that does not depend upon questions of fact, that, as seen, may not be considered by us under the incomplete bill of exceptions, and it only remains for us to affirm the judgment of the Superior Court, which is accordingly done.

Chicago City Ry. Co. and Chicago & G. T. Ry. Co. v. Isaiah C. Smith.

82	305
86	122
82	305
892	154

1. APPELLATE COURT PRACTICE—*Motion to File Supplemental Transcript Must be Made in Apt Time.*—Where neither a suggestion of diminution of the record, nor a motion to supply a further record, was made on or prior to the second day of the term when by the rules they should have been made, nor until the succeeding term, the Appellate Court is without jurisdiction to allow a supplemental transcript to be filed.

2. SAME—*When There is No Assignment of Errors.*—Where there is no assignment of errors upon the original transcript, there is, therefore, nothing for this court to consider, and the appeal will be dismissed.

Motion, to strike from the files the bill of exceptions contained in the supplemental transcript. Heard in the Branch Appellate Court at the October term, 1898. Allowed and appeal dismissed. Opinion filed May 2, 1899.

WM. J. HYNES and W. J. FERRY, attorneys for appellant, the Chicago City Ry. Co.

SAMUEL A. LYNDE, attorney for appellant, the Chicago & Grand Trunk Ry. Co.; MASON B. STARRING, of counsel.

THORNTON & CHANCELLOR, attorneys for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

This cause is now before this court upon the motion of the appellee to strike from the files the bill of exceptions contained in the supplemental transcript filed herein.

At the March term, 1897, appellants filed in this court what is certified to be a complete transcript of the record in said cause in the court below, except the amended, and a second amendment to the declaration. But this transcript contained no bill of exceptions. At the same term the cause was continued by agreement to the October term, 1897.

The first day of the October term, 1897, on motion of attorneys for appellants, and upon a suggestion of diminution of record, the Appellate Court of this district granted leave to file a supplemental transcript, which was done. The supplemental transcript contains only the restored amended declaration and a bill of exceptions.

Neither a suggestion of diminution of record, nor a motion to supply further record, was made on or prior to the second day of the March term, 1897, nor until the October term, 1897. The Appellate Court had then no jurisdiction to allow the filing of a supplemental transcript. *O'Kane v. W. End Dry Goods Store*, 79 Ill. App. 191, and cases there cited; *Mason v. Gibson*, 13 Ill. App. 463, not cited in the *O'Kane* case.

The order of October 7, 1897, granting to appellants leave

Robinson v. Holmes.

to file supplemental transcript of record was erroneously entered, and will be set aside, and the supplemental transcript of record filed in this cause will be stricken from the files.

There is no assignment of errors upon the original transcript. There is, therefore, nothing for this court to consider, and the appeal will be dismissed.

It is, then, unnecessary to consider other points presented in this motion as to the entry of orders by the court below after the appeal bond was filed. Appeal dismissed.

Robert Robinson v. Janette C. Holmes.

82	307
87	616
82	307
a92	*618

1. **COLLATERAL UNDERTAKING**—*Defined*.—A collateral undertaking is a contract based upon a pre-existing debt, or other liability, and including a promise to pay, made by a third person having immediate respect to and founded upon such debt or liability without any new consideration moving to him.

2. **PLEADING**—*On Collateral Promises*.—In declaring upon a collateral promise the declaration must be special.

Assumpsit, on the common counts. Trial in the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion on rehearing filed May 2, 1899.

ASHCRAFT & GORDON, attorneys for appellant.

JAMES A. FULLENWIDER, attorney for appellee.

PER CURIAM on rehearing.

Appellee offered to remit the interest which, as we formerly held (75 Ill. App. 203), she was not entitled to recover under the averments of the declaration, and a rehearing was allowed upon appellee's petition therefor, remittitur having been filed.

Appellant's counsel insist that the clause in the deed by

which appellant assumed and agreed to pay the mortgage debt is to be considered a collateral undertaking, and hence, under the rule announced in *Runde v. Runde*, 59 Ill. 102, *Power v. Rankin*, 114 Ill. 52, and other cases, the action can not be maintained under this declaration, which is general, but the contract must be declared upon specially.

A collateral undertaking is defined to be "a contract based upon a pre-existing debt, or other liability, and including a promise to pay, made by a third person having immediate respect to and founded upon such debt or liability, without any new consideration moving to him." (*Bouvier's Law Dic.*) Such is clearly the contract in question here. It is a promise by the Robinsons, in consideration of the sale and conveyance to them of the real estate by the Fortners, to pay the pre-existing mortgage debt to the holder thereof. No new consideration moved from the holder of the mortgage debt to appellants, for their promise to pay. The consideration was the conveyance of the real estate to them by another party, and the promise was made to such party only, although inuring to the benefit of the holder of the obligation. In *Mason v. Munger*, 5 Hill, 613, the plaintiff had loaned money to one Williams, who sold his stock in trade to the defendant, and the latter promised, in consideration of the sale, to pay the debt of Williams to the plaintiff. It was held that the promise was collateral, and that the declaration must be special.

In *Maxwell v. Longenecker*, 89 Ill. 102, it was claimed that appellant promised to pay appellees out of money in his hands, belonging to third parties, for work done by appellees for the latter. It was held that to recover at all, if the evidence had so warranted, the declaration must be special, citing *Hite v. Wells*, 17 Ill. 91, and *Eddy v. Roberts*, Id. 508. In this last cited case it is said :

"If another is primary or principal debtor, and the relations of debtor and creditor remain unchanged both as to the right and the remedy, and no trust is created by the transaction out of which the promise arose, such promise is in its nature collateral and not original."

Przekwas v. Illinois Steel Co.

The promise sued upon in the case before us being collateral, should have been declared on specially.

This is not a case where, there having been full performance of an express original contract, and nothing remaining to be done but to pay the money, the action can be maintained upon the common counts, and the authorities which so hold (*Cath. Bish. v. Bauer*, 62 Ill. 188, and others cited in appellee's brief), are not in point in the present case.

For the reasons now stated, additional to those indicated in the former opinion filed herein, the judgment must be reversed and the cause remanded.

Felix Przekwas v. Illinois Steel Company.

1. **PRESUMPTIONS**—*Where the Bill of Exceptions Does Not Purport to Contain all the Evidence.*—Where the bill of exceptions does not purport to contain all the evidence, the court is bound to presume there was sufficient evidence before the trial court to justify its direction to the jury to find the defendant not guilty, and also to sustain its verdict.

Action in Case, for personal injuries. Trial in the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Verdict and judgment for defendant by direction of the court; appeal by plaintiff. Heard in this court at the October term, 1898. Affirmed. Opinion filed April 17, 1899.

Statement of the Case.—Appellant was injured while employed by appellee in the movement of certain push cars, used to convey ore to its yard, on September 14, 1895. He brought suit, charging appellee with negligence in loading the ore so that in the movement of the cars it fell off and struck him; also that a push car which was negligently loaded and in a bad state of repair and condition, ran off the tracks; that he was commanded by his foreman to leave the work he was employed to do and assist in putting the car on the tracks; that he refused, and was again commanded by the foreman to so assist, and through fear of losing his employment, he did assist in putting the car on

the tracks, and while so engaged, and in the exercise of reasonable care, the car being in an unsafe condition, dumped the ore, which threw appellee to the ground, injuring him, etc.

The general issue being pleaded, a trial was had before the court and a jury. At the close of all the evidence offered by both parties, the court instructed the jury to find the defendant not guilty, when appellant asked that the jury be polled; but the court refused, and directed the clerk to enter a verdict of "not guilty," which was done, and after overruling appellant's motion for a new trial, entered judgment on the verdict, from which the appeal is taken.

WORTH E. CAYLOR and WILLARD GENTLEMAN, attorneys for appellant.

KEMPER K. KNAPP, attorney for appellee.

MR. PRESIDING JUSTICE WINDES, delivered the opinion of the court.

The only question presented by appellant is, whether there was error in instructing the jury to find the defendant not guilty.

The bill of exceptions does not purport to contain all the evidence, but a statement in what purports to be a report of the proceedings upon the trial, and forming a part of the bill of exceptions, in these words, viz., "which was all the evidence," is stricken out. Counsel for appellant, in oral argument, stated that he supposed these words were stricken out by him.

In this state of the record, we are bound to presume there was sufficient evidence before the court to justify its direction to the jury, to find the defendant not guilty, and also to sustain its judgment. *Miner v. Phillips*, 42 Ill. 129; *Schmidt v. Ry. Co.*, 83 Ill. 412; *Cogshall v. Beesley*, 76 Ill. 445; *Culliner v. Nash*, Id. 515.

We had, however, before reaching the above conclusion, made a careful examination of the evidence, guided by the

argument of appellant's counsel, and are unable to say from such examination that the evidence was sufficient to justify its submission to the jury.

A model of the push cart, the dumping of which it is alleged caused appellant's injury, was exhibited to the court and jury during the examination of the witnesses as to the cause and circumstances of the accident. The witnesses were examined with reference to the working and mechanism of the car, and in answer to questions it appears that by certain indications and illustrations, the nature of which do not appear in the record, the witnesses explained to the court and jury, by the use of the model, the working and mechanism of the car, and how the accident was caused. This model was not offered in evidence, though appellant's counsel stated he so intended, and not having it before us, we are unable to determine from the statements of the witnesses, whether there was sufficient proof of appellee's negligence to justify the submission of the case to the jury. For all that we can tell, an examination of the model in the light of the testimony of the witnesses, their explanations and illustrations, may have convinced the learned trial judge that the accident could not have been caused for the reasons alleged by appellant.

For both the reasons stated the judgment is affirmed.

Mary Hope v. The West Chicago St. R. R. Co.

1. INSTRUCTIONS—*Calculated to Create Erroneous Impressions.*—An instruction calculated to create the impression in the minds of the jury that there was danger in alighting from an electric car, even when at rest, and to induce them to require a higher degree of care on the part of appellant than the law requires, is erroneous.

2. SAME—*Erroneous as to Weighing the Evidence.*—An instruction which states that "After fairly and impartially considering and weighing the evidence in this case as herein suggested, the jury are at liberty to decide that the preponderance of evidence is on the side which, in their judgment, is sustained by the more intelligent and better informed, the more credible, and the more disinterested witnesses, whether these are the greater or smaller number," is erroneous.

82	311
d102	*620
82	311
105	*654
82	311
d206s	*277

3. SAME—*Unnecessarily Verbose and Lacking in Clearness.*—It is not reversible error to refuse an instruction which is unnecessarily verbose and lacking in clearness. Lengthy instructions are more likely to confuse than aid the jury.

4. EVIDENCE—*Rebutting the Presumptions of Failing to Produce.*—Evidence of a division superintendent that he could not ascertain anything in regard to the alleged accident, is competent to rebut the presumption which the failing to produce such evidence, raises against a party.

Action in Case, for personal injuries. Trial in the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Verdict and judgment for defendant; appeal by plaintiff. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed April 17, 1899.

A. B. CHILCOAT and W. P. BLACK, attorneys for appellant.

ALEXANDER SULLIVAN, attorney for appellee; EDWARD J. McARDLE, of counsel.

MR. JUSTICE ADAMS delivered the opinion of the court.

This was a case by appellant against appellee for negligence *per quod* she suffered injury. The declaration contains the following averments:

"The plaintiff was a passenger on said defendant's line of cars, on, to wit, said 13th day of January, 1896, going north on Robey street, and after said car had stopped for the purpose of allowing plaintiff to alight therefrom, at the intersection of said Robey street and Carroll avenue, and while plaintiff was in the act of alighting therefrom at said street intersection, plaintiff, while so alighting, or attempting to alight therefrom, exercising all due care and vigilance upon her part for her own safety, and without fault or negligence on her part in alighting from said car, the defendant negligently permitted and caused said car to start suddenly and violently while plaintiff was in the act of alighting therefrom, by reason of which plaintiff was thrown from said car and received great, serious and permanent injury, to wit," etc.

The jury found the defendant not guilty, and judgment was rendered on the verdict. Appellant's counsel contend that her case was proved by a preponderance of the evidence, but this is a question which we do not find it necessary to consider on this appeal.

The car on which appellant was a passenger, and from which she attempted to alight, was propelled by electricity. There is evidence tending to prove that she attempted to alight from the car when it had come to a full stop on Robey street, at the south side of Carroll avenue, when the car started suddenly and she fell off on the ground.

There was no affirmative evidence of any want of ordinary care on the part of appellant. The court, at appellee's request, gave to the jury this instruction :

"The court instructs the jury that in determining the question whether the plaintiff was negligent in and about alighting from the street car in question, under the circumstances under which the jury find from the evidence the plaintiff did so, they are to take into consideration, not alone the age and condition of plaintiff at the time, but also the relative danger and risks attending the act of alighting from a car propelled by electricity, as the one in question was, and the character and condition of the locality, and the plaintiff's prior knowledge of its character and condition; and they are instructed that the plaintiff was required to exercise care for her safety in proportion to the danger and risks attending the act of alighting from an electric car under such circumstances, and a failure on her part to exercise this care is negligence which deprives her of the right of recovery in this action; and if the jury believe from the evidence in this case that the plaintiff did not exercise such care, and was guilty of such negligence, and that such failure to use such care and such negligence contributed in any way to the injury complained of in this action, then the jury should find the defendant not guilty."

The appellant's theory, as stated in her declaration, was that the car had stopped for the purpose of allowing her to alight, when she attempted to alight. There was no evidence that there is any danger on alighting from an electric car when it is at rest. Manifestly, the propelling power of a car is a circumstance of no moment as affecting the risk of alighting therefrom when it is at rest. The power under such circumstances, can not possibly increase the danger of alighting, if there is any danger in alighting from a stationary car. But the court, in the instruction, assumes not only that there is danger in alighting from a standing

car, but that there is greater danger in alighting from an electric car while at rest than from some other kind of street car, thereby inviting the jury to require greater care on the part of appellant in alighting from the car on which she was a passenger when it stopped, than she would be required to exercise while alighting from a car at rest, propelled by power other than electricity. This is at variance with the views expressed in *St. Ry. Co. v. Meixner*, 160 Ill. 320. The language is, "the relative danger and risks attending the act of alighting from a car propelled by electricity, as the one in question was." And the jury were instructed, "that the plaintiff was required to exercise care for her own safety in proportion to the dangers and risks attending the act of alighting from an electric car under such circumstances." This plainly assumes that there was apparent danger in alighting from the car under the circumstances, because, certainly, the appellant could not be required to guard against danger not apparent. The instruction was calculated to create the impression in the minds of the jury, that there was danger in alighting from an electric car even when at rest, and induce them to require a high degree of care on the part of appellant.

Appellee's counsel suggests, in his argument, that there was evidence tending to prove that appellant attempted to alight from the car while it was in motion, and that the appellee was entitled to the instruction on that theory. The instruction is not framed on any particular theory; it submits no hypothetical case to the jury; but if it be assumed that it is to be understood as applying to the theory that appellant attempted to alight from the car while it was in motion, then it is bad as wholly ignoring appellant's theory, which her evidence tended to prove, namely, that the car was at rest when she attempted to alight from it. What there was appropriate in submitting to the consideration of the jury, in connection with the question of appellant's care, "the character and condition of the locality," etc., we do not perceive, as there was no evidence of anything in the character or condition of the locality which presented any

danger to one alighting from a car. The giving of the instruction was prejudicial error.

Appellant's counsel objects to appellee's fifth instruction, which concludes as follows :

"After fairly and impartially considering and weighing all the evidence in this case as herein suggested, the jury are at liberty to decide that the preponderance of evidence is on the side which in their judgment is sustained by the more intelligent, the better informed, the more credible, and the more disinterested witnesses, whether these are the greater or smaller number."

We held a similar instruction erroneous in two cases decided at the October term, 1898. *Eastman v. W. C. St. R. R. Co.*, 79 Ill. App. 585, and *Barron v. Burke*, Gen. No. 8003, both cases unreported, for reasons fully stated in the opinion in the former case.

The objection to the instruction was not made in the opening argument of counsel, but in their reply argument, and for that reason we would not pass on the objection were it not that the case may be retried. *Rhodes v. Rhodes*, 172 Ill. 187.

Appellee's instruction ten, objected to by appellant's counsel, can have no application except to the theory that appellant attempted to alight from the car while it was in motion, in which case she could not, under her declaration, recover at all. So lengthy and somewhat involved an instruction as instruction ten was unnecessary. It would have been better had the court concisely instructed the jury that if they believed from the evidence that the plaintiff attempted to alight from the car while it was in motion, she could not recover under her declaration. We can not say, however, that the giving of instruction ten is reversible error.

Objections are made to the refusal by the court of appellant's fifth and eighth instructions. Instruction five is as follows :

"The court instructs the jury that if they find a verdict for the plaintiff, in estimating the damages, they are to consider the health and condition of the plaintiff before the

injuries complained of, as compared with her present condition, in consequence of said injury, and whether the said injury is in its nature permanent, and how far it is calculated to disable her in engaging in those household pursuits and employments for which, in the absence of such injury, she would be qualified, and also the physical and mental suffering to which she was subjected by reason of said injury, and to allow such damages as in the opinion of the jury will be a fair and just compensation for the injury which she has sustained."

We can not approve of this instruction. The health and physical condition of the plaintiff before her injury, if any; her health and physical condition since the time of the alleged injuries; whether she received injuries as alleged, and, if so, what effect, if any, they had on her; and whether, if she was injured as alleged, she experienced physical and mental suffering as direct results of the injuries, are all questions to be determined by the jury from the evidence; but the instruction seems to assume that her present condition is a consequence of the injury, that the injury is calculated, to some extent at least, to incapacitate her for her ordinary household pursuits and employments, and that she did endure some physical and mental suffering by reason of the injury. The words "to consider the health and condition of the plaintiff before the injuries complained of, as compared with her present condition in consequence of said injury," seem to assume that she suffered all the injuries complained of.

An instruction substantially the same as appellant's eighth instruction, was before the court in *W. C. St. R. R. Co. v. Manning*, 170 Ill. 417, and is quoted at length on pages 429, 430; and while the court held that the giving it was not reversible error, it also criticised it as being unnecessarily verbose and lacking in clearness, and we can not say that the refusal of the instruction is reversible error. Very lengthy instructions, such as the one in question, are more likely to confuse than aid the jury.

Augustine L. Burns, appellant's witness, was asked on cross-examination, "What is your business now?" to which

he answered, "I am a watchman as a general rule, sometimes in the building department, mostly for the general contractors." Meaney, appellee's witness, having testified that he had known Burns about twelve or thirteen years, was asked, "During that time what, if anything, did you know him to do in the line of work? What did you see him doing?" These questions were objected to, and the objections were overruled. We perceive no error in the ruling. Meaney also testified in chief that he knew the reputation of Burns for truth in the neighborhood where he resided, and that it was bad. On cross-examination he testified that he had heard no one speak of his reputation for truth except police officers; that he knew his reputation for truth in the vicinity where he lived, but not in the last two years; whereupon counsel for appellant moved to exclude his testimony, which motion was overruled. We think the ruling was proper; that the value of the witness' testimony was a question for the jury. We do not understand, as seems to be assumed by counsel, that the inquiry as to reputation for veracity is legally limited to the immediate neighborhood where the witness resides, but if one lives in a community, as, for instance, in Chicago, the neighborhood is the community. *Jones on Law of Ev.*, Sec. 862.

Burns, on cross-examination, was asked certain questions in relation to a conversation with a third party about the case, and denied stating what was suggested by the questions. Buckminster, a witness for appellee, testified that he heard the conversation, and what it was. Buckminster's testimony, assuming it to be true, tended to show that Burns was willing to sell his testimony—to testify, for a consideration, in accordance with the wishes of the highest bidder. It was competent to cross-examine Burns as he was cross-examined, and appellee was not concluded by his answers, but was entitled to call another witness to show his animus in the case. *Jones on the Law of Evidence*, Sec. 829; *Phenix v. Castner*, 108 Ill. 207.

John W. Stevenson, division superintendent of appellee, was called and testified that he had made inquiries of all

the conductors and motermen who were on Robey street at the time of night when appellant claims to have been injured, except one conductor who was no longer in appellee's employ and whom he could not find, and that he could not ascertain anything in regard to the alleged accident. It is objected that this evidence was incompetent. We think otherwise. "The mere withholding or failing to produce evidence which, under the circumstances, would be expected to be produced, and which is available, gives rise to a presumption against a party." Jones on Law of Ev., Sec. 17.

The evidence was competent for the purpose of excluding the presumption which might arise against appellee, from its failure to produce as witnesses the conductor and motorman of the car. The abstract shows no exception to the examination of Stevenson, but we have considered the objections urged in anticipation of another trial of the case, although not strictly bound so to do.

The judgment will be reversed and the cause remanded.

Garrie S. French, Receiver, v. Genoa Junction Ice Co.

1. **APPEALS—*What is Not a Final Order.***—An order directing a receiver to turn over money collected by him with leave to apply to court for the payment of his charges, and to have the same taxed as costs against the complainant, is not a final determination of his rights and is not appealable.

Appeal, from an order of the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Dismissed. Opinion filed May 2, 1899.

S. A. FRENCH, attorney for appellant.

LOUIS J. PIERSON, attorney for appellee.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

This is an appeal by Garrie S. French, receiver, from an

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order of the Circuit Court, disallowing his claim for compensation for services as receiver and disbursements for attorneys' and solicitors' fees, which he seeks to have paid out of funds of the defendant corporation in his hands as such receiver. The order directs him to turn over to the appellee money collected by him as receiver, and gives him leave to apply to the court for the payment of his charges by, and to have the same taxed as costs against, the complainant. It also requires the filing of a bond by the treasurer of appellee, with good and sufficient surety, upon the approval of which the receiver is to pay over the said funds in his hands. From this order the receiver appeals.

It appears that there had been a previous order directing the receiver to turn over to the appellee all the assets of the latter in his hands, which reserved the question of his compensation as receiver for further consideration. The abstract filed by appellant is defective in not supplying the dates of these orders respectively, but they appear from their contents and from an additional abstract filed by appellee, to have been entered in the order named.

A motion made to dismiss this appeal was reserved to the hearing. It is based upon the contention that the order appealed from is not final.

The order of December 20th, which, as appears from appellee's additional abstract, is the date of the order appealed from, refuses the receiver's claim for compensation only as against the funds of the defendant corporation in his hands. It does not finally dispose of his claim for compensation, but gives him leave to apply for payment of his charges by the complainant, to be taxed against the latter as costs. If this should be done and the claim allowed, and then collected by execution or otherwise, the receiver would have no cause to complain. He could not properly object, because the money comes from the complainant instead of the defendant. It can not be assumed that a judgment against the complainant in the receiver's favor would not be paid or could not be collected. It is clear that the order appealed from is not a final judgment, order or decree

against the appellant, within the meaning of section 68 of the practice act. Moreover, the order complained of required from appellee a bond, and the money held by the receiver is to be paid over to the defendant company only upon the approval of such bond. The abstract does not state the condition of the bond. It is subject to approval by the court, and may be conditioned to require the payment of such sum, if any, as by final decree the court may award out of the assets in question to apply on receiver's charges.

The order appealed from refuses, for the time being, to allow the receiver's claim for compensation. The fact that a bond is required of appellee as a condition of receiving the funds, indicates that the question of allowance may be still left open.

In *Farson v. Gorham*, 117 Ill. 137, 140, it is said :

"In *Coates v. Cunningham*, 60 Ill. 467, we held that a decree appointing a receiver is interlocutory, and a writ of error will not lie to reverse a decree removing a receiver, as was done by the decree here. It is true the decree or order entered in this case gave the defendant in error the possession of the property, but that can not in any manner impair the rights of the complainant, as the defendant in error was required to give bond and security, and all moneys which may come into his hands under the order will be subject to the final decree which the court may ultimately render in the cause."

The question of the receiver's right to compensation out of the property in his hands, and of the right of the defendant to receive back its own without diminution for receiver's costs and charges, as having been wrongfully taken, is argued at some length. But these questions we are not at liberty now to consider. It is manifest that the order appealed from is not a final determination of the receiver's rights, and is not appealable. *Lacey v. Baker*, 5 Ill. App. 426.

The appeal, therefore, will be dismissed.

James B. Swing, Trustee, v. The Blakely Printing Co.

1. **BILL OF EXCEPTIONS**—*Must Show Evidence Offered and Rejected.*—Where evidence is offered by a party litigant and excluded upon objection, the nature and character of such evidence should be shown in some proper way by the bill of exceptions so that the Appellate Court can determine the errors assigned upon its exclusion.

Assumpsit, on an assessment, etc. Trial in the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Verdict and judgment for defendant; appeal by plaintiff. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed May 2, 1899.

HARVEY STRICKLER, attorney for appellant.

A. L. FLANINGHAM and L. B. HILLES, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

A judgment of ouster against the Union Mutual Fire Insurance Company, an Ohio corporation, was entered by the Supreme Court of Ohio, in 1890, and appellant was appointed trustee of the creditors and stockholders of said company, under the provisions of the revised statutes of Ohio.

In his capacity as such trustee, the appellant brought this suit, in 1896, to recover from appellee, as a member of said insurance company, the amount of an assessment alleged to have been made by said trustee against appellee, of \$687.50. A trial was had and a verdict finding the issues for the defendant (appellee) was returned by direction of the trial judge, and a judgment for costs of suit was entered against appellant.

For present purposes, it may be assumed that, as appellant argues, appellant made proof of everything he was required to establish preliminarily to proving the assessment that was made by him, and that it only remained for him

in order to make at least a *prima facie* case, to further show the assessment that was actually made by him. He then offered in evidence that assessment as contained in a book produced to and identified by a witness, the witness testifying that the book produced and exhibited by him, "was a record of the assessment made by the plaintiff, pursuant to the order of the Supreme Court (of Ohio); that the book contained the record of that whole assessment as made by the plaintiff; that it is the assessment made by the trustee." (We quote from appellant's brief.) Appellant's brief adds: "This record of the assessment was in fact the very instrument sued on. If it showed a valid assessment, plaintiff would be entitled to recover, and if it did not show a valid assessment, or was in itself incomplete, and insufficient to show a proper assessment, then plaintiff's case must fail, unless plaintiff cured the defect by other evidence."

But the trial judge excluded the offered book, presumably because, as we are bound to conclude, the book, or record it contained, did not, for some reason, show "a valid assessment, or was in itself incomplete, and insufficient to show a proper assessment."

Although this book was offered in evidence by appellant, and, presumably, was and is in his possession and control, he has not incorporated it, or a copy of it, into the record, nor has he attached it to the bill of exceptions as an exhibit, and we have no means of seeing it and judging for ourselves, as our duty requires, whether it shows a valid assessment or not. Neither is there anywhere in the record, abstracts or briefs, any statement of what the book contains. It is variously spoken of, by witnesses and counsel, by name, but calling a document by a particular name proves nothing.

The bill of exceptions shows, affirmatively, what, in some respects, the book does not contain. For example, it is recited in connection with the refusal of the court to admit the book in evidence, that "there was nothing to show that the book offered in evidence contained the assessment made by the trustee, except the testimony of the witness Will-

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iams, (the witness in connection with whose testimony the book was offered). The book had never been filed in the Ohio court, and it bore no evidence that it contained the assessment which the court ordered approved."

It also appears, elsewhere in the bill of exceptions, that the book contained original entries of claims allowed by the trustee to the extent of four only, in number, and contained only a copy, transcribed from an original book of losses kept by the directors of the company, of the entries of claims or losses allowed by the directors prior to the appointment of the trustee. As said in *Bromwell v. Estate of Bromwell*, 139 Ill. 424, "As the bill of exceptions contains no evidence as to what those entries were, we can not say that they had any bearing upon the questions at issue, and they must accordingly be disregarded." See, also, *Clifford v. Drake*, 110 Ill. 135.

It is most manifest that we can not reverse a judgment rendered because of the insufficiency or invalidity of a document of such vital importance which is kept from us.

For aught that appears, the judgment of the Superior Court was right, and it will be affirmed.

James Pease v. People ex rel. W. N. Perll.

1. **STATUTES—Rules of Interpretation.**—A statute must be interpreted according to its intent and meaning, and reasonably, so as to accomplish its general object. The different sections of a statute relating to the same subject, should be construed together in arriving at the legislative intent.

2. **SAME—Interpretation of Sec. 12, Art. 18, Ch. 79, R. S.**—Section 12, of Article 18, Chapter 79, R. S., entitled "Justices and Constables," providing for no imprisonment without a conviction of a jury, does not exempt a defendant from imprisonment where he fails to appear and make a defense.

Habeas Corpus.—Trial in the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Petitioner discharged and judgment against respondent for costs; appeal by respondent. Heard in this court at the October term, 1898. Reversed. Opinion filed April 17, 1899.

CATLIN, MOULTON & WEBBER, attorneys for appellant;
JOHN C. EVERETT, of counsel.

No appearance for appellee.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

A petition for habeas corpus on behalf of W. N. Perll, showing that he was imprisoned by appellant, the sheriff of Cook county, by virtue of an execution against his body issued by a justice of the peace upon a judgment before the justice entered on the verdict of a jury, he, the defendant, being defaulted and no execution having been issued against his goods and chattels, was heard before the Circuit Court and said Perll discharged, and a judgment for costs rendered against the sheriff, from which he has appealed.

The only question presented by the brief is as to the validity of the judgment for costs. The evidence shows that the suit, the hearing of which resulted in the judgment against Perll, was replevin; that the property was not found. Perll was served, but failed to appear at the time set for trial; the action proceeded in trover, the plaintiff asked a jury; a jury was called; the proceedings were in the usual form of jury trials before a justice of the peace; after the evidence was heard, a verdict was returned, viz.:

"We, the jury, find the defendant guilty of willfully and maliciously converting to his own use two bicycles, the property of the plaintiff, with intent to cheat and defraud the plaintiff, to the damage of plaintiff of sixty-eight dollars (\$68.00)."

On this verdict the justice entered judgment in trover and after the lapse of twenty days issued an execution against the body of Perll, which was returned "not found" as to Perll, no property found and no part satisfied. An alias execution was issued against the goods and chattels of Perll, and for want of such goods, then against his body, etc., which was returned, viz.:

"By virtue of the within writ I have made diligent search for the goods and chattels of the within named defendant,

whereupon to levy the same, and being unable to find any, did on this 13th day of April, A. D. 1898, take the body of the said within named W. N. Perll and deliver him to the keeper of the jail of said county of Cook as within I am commanded.

JOSEPH HIGGINS, Constable."

The Justice Act (S. & C., Ch. 79, Par. 48) is, viz:

"In all cases of trial before a justice either party may have the cause tried by jury if he shall so demand before the trial is entered upon, and will first pay the fees of the jurors," etc.

Paragraph 38 is, viz.:

"If the defendant shall not appear at the time of trial, after giving bail, or after being served with summons, and no sufficient reason be assigned to the justice why he does not appear, the justice shall proceed to hear and determine the cause, but shall not give judgment in favor of the plaintiff unless the plaintiff shall fully prove his demand in the same manner as if the defendant were present and denied the same," etc.

Paragraph 39 is, viz.:

"When the parties shall appear and be ready for trial, the justice shall proceed to hear their respective allegations and proofs," etc., etc. "If the action is for a tort, the judgment shall be for the plaintiff for the damages proved and costs of suits, or if no damages are proved the judgment shall be against the plaintiff for costs."

Paragraph 120 is, viz.:

"On all judgments in actions in tort or where the defendant is in custody or has been held to bail upon a *capias* as provided in this act, the justice may issue an execution against the body or goods and chattels of the defendant at the election of the plaintiff."

Paragraph 175 is, viz.:

"No person shall be imprisoned for non-payment of a fine or a judgment in any civil, criminal, *quasi* criminal or *quidam* action, except upon conviction by a jury," etc.

A statute must be interpreted according to its intent and meaning and reasonably so as to accomplish its general object. The different sections of a statute relating to the

same subject, should be construed together in arriving at the legislative intent. Sutherland on Staty. Constn., Sec. 215, 239 *et seq.*; Home Ins. Co. v. Swigert, 104 Ill. 653-64.

The statute, as we have seen, provides that either party may have the cause tried by a jury. It also says (Sec. 39) that when the parties shall appear and be ready for trial, the justice shall proceed to hear their respective allegations and proofs, and also (Sec. 38) when the defendant does not appear, "the justice shall proceed to hear and determine the cause, but shall not give judgment in favor of the plaintiff unless the plaintiff shall fully prove his demand in the same manner as if the defendant were present and denied the same."

These two sections provide for the same course of procedure whether the defendant be present or absent. Both sections say "the justice shall proceed to hear," etc., which manifestly means that he should hear the proof himself, or if the plaintiff in the exercise of his right, under section 48, calls for a jury, he should in the first instance submit the proof to a jury. If there were any doubt as to this being the duty of the justice, we think a consideration of Secs. 120 and 175 removes it.

Section 120 provides for an execution against the body of a defendant on judgments in actions in tort, but Sec. 175 makes imprisonment for non-payment of such a judgment unlawful, except upon conviction by a jury. It can not be possible that the legislature intended after providing for a jury trial to either party and execution against the body of the defendant on a judgment in case of tort when he appeared and defended the action, he should be exempted from such liability if he failed to appear and make a defense. Such a construction of the statute would be most unreasonable, and should not be indulged.

It appearing that the judgment in this case was in tort, based upon the verdict of a jury of twelve men, that the defendant willfully and maliciously converted property with intent to cheat and defraud the plaintiff, and on account of such conversion the judgment was rendered, the execution

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against his body was proper and his imprisonment legal. The fact that he failed to appear and defend the case is immaterial. He should not have been discharged, and therefore the judgment against appellant for costs was erroneous and is reversed.

Columbia Hardwood Lumber Co. v. William Brandenberger et al.

1. **LIENS**—*Sheriff and Assignee*.—Where a sheriff seizes goods on an execution, the execution debtor afterward makes an assignment and the sheriff transfers the goods seized to the assignee, subject to the lien and rights acquired by levy of the execution, the execution creditor is not deprived of any of his legal rights.

2. **ASSIGNEES**—*Liability for Unlawfully Disposing of Goods*.—If an assignee sells the assets and uses the proceeds unlawfully, a creditor to whom he has paid the proceeds of such sale can not be held to account for them to other creditors.

3. **PREFERENCES**—*Right Purely Statutory*.—The right to preference under Sec. 6, Chap. 10a, R. S. is purely statutory, and strict compliance is necessary to its enforcement; the claim for such preferences must be presented within ten days after seizure on execution whether an assignment follows or not.

Voluntary Assignment.—Appeal from the County Court of Cook County; the Hon. R. W. S. WHEATLEY, Judge, presiding. Appeal. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed May 2, 1899.

Statement of the Case.—Appellant obtained a judgment against the Knaus & Green Manufacturing Co. for \$1,314.93 and levied upon the property of the judgment debtor. Subsequently the latter made an assignment for the benefit of creditors and on the following day, January 22, 1895, by agreement between the parties an order was entered in the County Court directing the sheriff to turn over the property levied upon by him by virtue of the writ of execution to the assignee, and it was stipulated, agreed and ordered that the lien of appellee should in no manner be

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waived or released, but should remain to all intents and purposes as if the said property had remained in the hands of the sheriff and that the County Court should determine and enforce said lien.

It appears that the assignee carried on the business of the insolvent company and paid current expenses for nearly two years, during which time he received and disbursed over forty-one thousand dollars including fees to himself as assignee, and about three hundred dollars to his attorneys. The inventory filed by him shows that the property levied upon and turned over by the sheriff subject to appellant's judgment lien for \$1,314.93 was of an estimated value of over thirty-three hundred dollars and that there were in addition accounts receivable for over nine hundred dollars, while the total claims filed for indebtedness of the insolvent company, including the judgment of appellant and the claims of appellee for about \$233.82 were less than three thousand dollars.

No objection seems to have been made by either of the parties hereto to the conduct of the assignee in so carrying on the business. It is claimed that he "practically devoured the estate" and acted without authority from the County Court.

Appellant filed its petition and was declared entitled to its preferred lien. The assignee was ordered to pay the same out of the first money which came into his hands. Subsequently appellant filed another petition asking for an accounting from the assignee for the property which had been levied upon under appellant's execution, to which the assignee replied that he was unable to account for the property, as a large part had been sold and disposed of, and there was only left certain machinery and office fixtures, and that he could not state what had been realized therefrom. Meanwhile the assignee was directed to solicit bids for the property in his hands, and appellant bid seven hundred dollars for the remaining property formerly owned by the debtor "conditioned on the same applying on our judgment against Knaus & Green Manufacturing Company."

The court ordered, February 4, 1897, "that the lien of the said Columbia Hardwood Company be transferred from the property in the hands of the said insolvent at the time of the assignment herein, except book accounts, negotiable instruments, cash and choses in action to the property now in the hands of the assignee, except book accounts, negotiable instruments, cash and choses in action subject to the expenses of administration and labor claims, and that the bid of said Columbia Hardwood Lumber Company be accepted of the sum of seven hundred dollars for all of said property upon which said lien is now vested." The assignee thereupon executed a bill of sale and the property was turned over to appellant without objection.

More than three months thereafter appellees filed their petition, praying that appellant be compelled to pay their claims for labor, and upon a hearing the County Court directed appellant to pay to the assignee, for the use and benefit of appellees, the amount of their claims.

WILBER, ELDRIDGE & ALDEN, attorneys for appellant.

GEO. L. DOUGLASS, attorney for appellees.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

This is an appeal from an order of the County Court directing appellant to pay certain labor claims against an insolvent estate.

The statute provides (Rev. Stat., Chap. 10 b, Sec. 6) that all such claims for wages of any laborer or servant shall "be preferred and first paid to the exclusion of all other demands and claims." It is further provided (Chap. 38 a), when by the action of creditors the business of any person, firm or corporation shall be suspended or put in the hands of a trustee, all debts for labor shall be treated as preferred claims, and "shall be first paid in full, and if there be not sufficient to pay them in full, the same shall be paid from the proceeds of the sale of the property seized." The sec-

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ond section of this last mentioned act requires the claim to be presented within ten days after seizure on execution to "the officer, person or court charged with such property," or within thirty days after the same has been placed in the hands of any trustee, and it is then made the duty of the "person or court receiving such statement to pay the amount of such claim or claims to the person or persons entitled thereto."

It is contended by appellant that by the statutes, while the claim of the laborer is preferred, it is, nevertheless, not a lien. However that may be, the statute directs that such claims "shall be paid from the proceeds of the sale of the property seized," only where there is not sufficient to pay them in full otherwise. Where there is enough to pay such claims in full, there is no necessity of resorting to the proceeds of the sale of property seized on execution. It appears from this record that the assignee had, and for aught that appears, still has enough in his hands to pay these laborers' claims, without resorting to the property levied upon, and that the latter was ample to pay appellant's lien, and leave sufficient to more than pay appellees' claim. The property or its proceeds, which the assignee ought to have, must be deemed to be still in his hands. If the property was sold, the effect was to leave in the hands of the assignee a specific fund of money, from which payment could be made. *Hoover v. Burdette*, 153 Ill. 672, 680.

Until rightfully disposed of or accounted for, this property in the assignee's hands is applicable to payment of claims against the estate, and appellees can make application to have their claims paid out of it, and such application should be first made, or some reason appear for not making it, before proceeding, as they have done in this case.

The property seized under appellant's execution was turned over to the assignee three days after its seizure by the sheriff. By this procedure appellant was not deprived of any legal right, the transfer being subject to the lien and rights acquired by levy of the execution. *Plume & Atwood Mfg. Co. v. Caldwell*, 136 Ill. 163.

The County Court recognized the validity of the lien and directed payment of the judgment by the assignee. It became the duty of the assignee to comply with this order. If he sold and disposed of the property and used the funds unlawfully, he may be held to account. But the assignee is not here and his conduct is not now under review.

It is urged that appellee's claims were not presented in the time required by the statute to entitle them to preference as against appellant's execution.

The claims of appellees for labor were filed on the fourteenth day of February, within thirty days from the date of the assignment, but not within ten days from the seizure by execution. The right to preference is purely statutory, and strict compliance with the statute is necessary to its enforcement. If the property had remained in the sheriff's hands ten days after its seizure on execution there could be no question, under the statute, of the necessity of presenting appellees' claim "to the officer, person or court charged with such property within ten days after the seizure thereof by execution," in order to preserve such right of preference. The fact that the property was turned over to the assignee, and that the latter and the County Court became the "officer, person or court" charged therewith under an agreement and order which preserved the lien "to all intents and purposes as if the property remained in the hands of the sheriff," did not relieve appellees of the necessity of presenting their claim within ten days, as required by statute, in order to entitle them to preference over appellant's execution out of the proceeds of the sale of the property levied upon. It would scarcely be contended, where an execution had been levied and more than ten days elapsed after the seizure thereunder by the sheriff before the assignment, that the subsequent turning over of the property levied upon to an assignee has the effect to revive the right, already expired, to present these claims, and give thirty days additional time in which to do so, and obtain the preference as against the execution lien. We understand the statute to mean that the claim must be presented

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within ten days after seizure on execution, whether an assignment follows or not.

The claims having been filed with the assignee within thirty days after the assignment, the right of preference was thereby preserved against property coming into the assignee's hands free from, or in excess of the execution lien, but not against that subject to appellant's prior claim.

The order of February 4, 1897, is not only ambiguous but inaccurate. The transfer of appellant's lien from "property in the hands of the said insolvent at the time of the assignment" is apparently meaningless. Appellant's lien at that time was upon property in the sheriff's hands—not the insolvent's. Appellant's bid was accepted according to its terms, to apply on the judgment. Such was the fair purport and meaning of the transaction, and the order of February 4th must be construed accordingly. Appellant has received but a part of its judgment, and is entitled to retain it as against appellees' claims.

The decision in *First National Bank v. Doane*, 140 Ill. 193, which is relied upon to sustain the action of the County Court in charging appellant with payment of these claims out of the property it purchased to apply on its execution, is not, we think, applicable to the facts before us. There, Doane had received all the assets of the insolvent in payment of claims held by him, under an order of distribution which was a nullity, because made before the expiration of the three months allowed by statute, and to the exclusion of other creditors whose claims are filed within the statutory time, and who were equally entitled to a *pro rata* share of the estate. He was compelled to pay back to the assignee what he had wrongfully received. In the case before us appellant received but a small portion of the assets held by the assignee subject to its execution, and out of which it was entitled to have its execution lien satisfied, and received it rightfully.

It is often for the benefit of creditors of an insolvent estate, that property seized under execution before assignment should be turned over to an assignee for disposition,

subject to the execution lien, instead of being sacrificed, it may be, at a sheriff's sale. If the judgment creditor, by such action, is not only to lose the larger part of his debt, but is to be compelled to pay cash to the full extent of a bid inadvertently made for a remnant of assets, that he is perhaps induced to bid more for to apply on his judgment than he would have paid, or the assignee could have secured in cash, creditors having liens will hesitate to expose themselves to such liability.

The appellant's bid was expressly conditioned on its being applied on the execution. It was accepted upon that condition, notwithstanding the ambiguous form of the order of February 4th. It is inequitable, after appellant was led—perhaps misled—into making such bid, to compel its application otherwise, and it should not be done unless the law so requires.

The order of the County Court, requiring appellant to pay the assignee the amount of said claims, is reversed and the cause remanded.

MR. JUSTICE SHEPARD.

The appellant's lien was, by virtue of the statute, subordinate to the preferred claims of appellees for labor, and the burden was upon appellant to show, which was not done, that there was other property of value in the hands of the assignee sufficient to satisfy such claims. Under the doctrine of *Union National Bank v. Doane*, 140 Ill. 193, appellant having acquired all the property of value of the insolvent left in the hands of the assignee (so far as appears), must respond, as required by the order of the County Court, to the extent of its bid for the property.

I do not think that because the assignee may have wasted the estate, this furnishes any ground for relieving the property acquired by appellant from the preferred claims.

Harold V. Rasmussen et al. v. Granger Smith et al.

1. *PRACTICE—Vacation—Judgments by Confession.*—Where matters arise in an application to vacate a judgment by confession, proper to be submitted to a jury, further proceedings under the judgment should be stayed and the matters accordingly submitted.

Motion to vacate judgment by confession. Trial in the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Motion denied. Appeal. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded with directions. Opinion filed May 2, 1899.

WM. J. STAPLETON and JULE F. BROWER, attorneys for appellants.

SCHUYLER & KREMER, attorneys for appellees; D. J. SCHUYLER, of counsel.

MR. JUSTICE SHEPARD delivered the opinion of the court.

A judgment by confession under a power contained in a written lease between the parties, was entered in favor of appellees and against appellants.

A motion, made in apt time, to vacate the judgment, was heard upon affidavits and counter-affidavits, and overruled, and from the order denying the motion this appeal is prosecuted.

There is no question that the judgment by confession was for the proper amount of rent, if any, due at the time under the terms of the lease, or of the regularity of the judgment itself, or of the sufficiency of the power to confess judgment that the lease contains.

Appellants' chief contention is based upon their claim of an eviction from the premises. The facts and circumstances upon which appellants rely as constituting an eviction, are set forth in the affidavits filed and read in support of their motion to vacate the judgment.

The demised premises are described in the lease as, "the building known as Nos. 1535 and 1537, North Clark street,

together with the vacant space in the rear thereof * * * to be used and occupied solely as a private dwelling, livery and boarding stable."

It appears that the building consisted of two stories, the lower one being fitted up and used for a livery stable, and the second or upper story, in the front part, being arranged and used for flats or dwellings, and the rear part being a loft or store-room for vehicles and a repair and paint shop.

The only means of reaching this store-room with vehicles was by a runway which descended, in part, upon an adjoining vacant lot owned, also, by appellees.

After the lease was made and after appellants had entered into possession, the appellees set out to erect a building upon the adjoining vacant lot, over and upon which a part of the runway descended and rested, and it became necessary for the runway to be removed to admit of such building. This was done with the knowledge of appellants, but it is disputed that it was done with their consent. Subsequent offers were made by appellees to replace the runway in such place as the appellants might approve of, but so that it should be wholly upon and within the limits of the rear part of the lot upon which the leased building stood, or, in other words, upon that part of the demised premises spoken of in the lease as "the vacant space in the rear" of the building. The appellants refused to permit the runway to be so restored, because, as their contention is, "it could not be done except by the appropriation of land they had specifically leased, and for which they were paying rent under said lease," and which they were actually occupying and using. Unsuccessful negotiations respecting the matter of the runway continued for some time, when, as appellants say, they "became convinced that the appellees did not intend to restore the runway in its original position, and they elected to abandon said premises, of which election they notified the appellees." Upon such facts and circumstances, the claimed eviction stands. It is apparent from the bare statement, that with the new building occupying the ground upon which the runway in part descended, a

restoration of the runway in its original position was impossible. The appellant H. V. Rasmussen, in one of his affidavits, states that appellees did not offer to restore the runway "to the position occupied before its removal," and that they well knew "it could not be restored in any manner except by appropriating some other portion of the premises leased to affiant."

As against the statement that they did not offer to restore the runway to its precise former position, and the physical fact that they could not so restore it, because of the new building being in the way, appellees make no contention. Their answer is that they offered to and were willing to restore it upon any part of the vacant space in the rear of the building which was the only vacant space to which appellants had any right under the lease, and that for appellants to insist upon the impossible and for something to which appellants had no right, was unreasonable, and a mere excuse or pretense to get rid of their deliberate contract.

In view of the fact that a majority of the justices of the court are of opinion that the questions of fact involved in the controversy should be submitted to a jury for its determination, it becomes unnecessary and, indeed, would be premature, at this time, to discuss the law of eviction, and particularly, what acts by a landlord do, as a matter of law, amount to an eviction, which will justify the latter in abandoning leased premises and repudiating the contract, and, further, what acts by a tenant will, if a cause of eviction has arisen, amount to a waiver thereof by him, or estop him from claiming an eviction. The latter element of waiver and estoppel exists in this case, because of appellants' delay in removing from the premises for some time (whether reasonable and proper, or not, we do not say) after the claimed eviction occurred.

The order appealed from, to wit, the order of the Circuit Court denying the motion to vacate the judgment entered by confession, is accordingly reversed, and the cause remanded to the Circuit Court with directions to permit

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appellants, if they shall be so advised and apply, to plead to the declaration such matters of eviction as they may be advised of, with leave also to appellees to reply thereto, and to both parties to, in any appropriate manner, according to the rules of law, pleading and practice, applicable thereto, make an issue upon the question or questions of eviction, and of waiver, estoppel or avoidance thereof, and when properly formed, submit such question or questions to a jury—leaving the original judgment to stand as security—and to render such judgment upon the verdict as justice and law requires. Reversed and remanded, with directions.

Esther Spingold et al. v. David Tigner.

1. **VERDICTS**—*When Not to be Set Aside as Against the Weight of the Evidence.*—Unless a verdict is manifestly against the weight of the evidence, a reviewing court will not interfere with a judgment based upon it.

2. **PRACTICE**—*Objections to Evidence Must be Shown in the Court Below.*—Objections to evidence must be made in the trial court. Such objections can not be interposed for the first time in the Appellate Court.

Action in Case, for maliciously swearing out a search warrant. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed May 2, 1899.

Statement of the Case.—This is an action instituted by appellants against appellee for maliciously swearing out a search warrant and causing their two business places to be searched for stolen furs. Appellee, representing Henry Bennett, a fur dealer of New York City, sold and shipped to B. Forcher & Co., of Chicago, 1,000 Astrakhans and 50 black-dyed goat rugs. Afterward appellee, on behalf of Bennett, commenced a replevin suit for these furs against B. Forcher & Co. Not succeeding in obtaining the furs under the replevin suit, appellee swore out a search warrant,

alleging that the furs in question had been stolen from said Bennett, and that such stolen goods were concealed at 299 and 339 South Clark street, occupied by appellants as pawn-brokers.

Appellee, accompanied by a constable, searched both places of business of appellants in the day time, read the warrants to appellants in the presence of customers, notwithstanding appellants' protests, and found nothing.

There was a jury trial and defendant found not guilty. Judgment was entered for costs against appellants, and a motion for a new trial having been overruled, this appeal is prosecuted.

B. M. SHAFFNER, attorney for appellants.

BLUM & BLUM, attorneys for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

On behalf of appellants it is contended that the verdict is contrary to the evidence. The case was fully and fairly submitted to the jury. The law is, that unless the verdict is manifestly against the weight of evidence, a reviewing court will not interfere with a judgment based upon such verdict. After a careful examination of the testimony as it appears in the abstract, we are quite satisfied with the verdict. It does not appear to us to be manifestly against the weight of evidence.

It is also contended on behalf of appellants, that the trial court erred in permitting appellee to testify as to advice given to him by his attorneys, without having first shown that they were "respectable attorneys in good standing." As to this we need only to say that the admission of that testimony was not objected to at the trial. Such an objection can not be interposed for the first time in this court.

Appellants contend that the court below erred in modifying the following instruction asked by them, viz.:

"The court instructs the jury that by the constitution of this State it is provided that the right of the people to be

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secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated."

"And if they believe from the evidence that the defendant caused or procured the premises of the plaintiffs in question to be searched and that such search was unreasonable, malicious, and made without probable cause, then the jury will find the defendant guilty."

The court declined to give the first sentence of that instruction, that is, the part which states what the constitution provides, and gave the balance. That portion of the instruction which was given stated the law correctly and fully as to the point involved. The part omitted was only an abstract statement of law embodied in the constitution of the State. There was no error in so modifying that instruction.

It is also contended on behalf of appellants, that the trial court erred in giving the fourth instruction asked by appellee, which is as follows, viz.:

"If you find from the evidence that B. Forcher & Co. purchased the furs in question, fraudulently and without any intention to pay for the same, then Bennett still had the right to rescind the contract of sale and recover back the furs in question."

That instruction is not pertinent to the issue, and should not have been given. We are, however, unable to see that it could have done any harm. It seems as though the court and counsel must have had in mind some question as to the title to, or possession of, the property—perhaps the replevin suit. The jury could not have understood it as bearing upon the question of malice or probable cause—or the advice of attorneys, or any other matter material to the issue between appellants and appellee.

Perceiving no reversible error, the judgment of the Superior Court is affirmed.

• **B. Franklin Kronkrite et al. v. Thomas J. McGrath,
Trustee, et al.**

1. **APPELLATE COURT PRACTICE**—*Objections Must First be Made in the Court Below.*—Questions relating to the amount of attorney fees in a foreclosure proceeding must be presented to the master or to the chancellor; they can not be raised for the first time in this court.

Foreclosure Proceedings.—Trial in the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Decree for complainant. Appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed April 17, 1899.

FRANKLIN L. CHASE & P. J. O'SHEA, attorneys for appellants.

GEORGE F. BORMAN, attorney for appellees.

MR. JUSTICE SEARS delivered the opinion of the court.

The question presented upon this appeal is as to the propriety of that part of the decree of sale in a foreclosure suit, which allows the sum of \$640.90 as solicitor's fees. The amount of the indebtedness secured by the trust deed foreclosed was \$22,387.05. The trust deed contained the following provisions, to apply in case of default in payment of the secured indebtedness and upon the filing of a bill to foreclose and prosecuting the same to a decree for sale of the mortgaged property: "and out of the proceeds of any such sale, to first pay the costs of such suit, all costs of advertising, sale and conveyance, including the reasonable fees and commissions of said party of the second part, or person who may be appointed to execute this trust, and three per cent on the amount of such principal, interest and costs for attorney's and solicitor's fees, and also all other expenses of this trust."

No complaint is made of the decree ordering sale of the mortgaged property, except as to the amount decreed for solicitor's fees. It is not contended that this amount exceeds the three per centum stipulated in the trust deed, but it is

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urged that the evidence fails to show that the amount allowed is a reasonable and customary fee for the services rendered. The contention is without merit.

Borman testifies as to the services rendered in this behalf, and that \$750 would be a fair and reasonable fee for such services. The witness is a practicing lawyer. While counsel for appellees were examining another lawyer upon same branch of the case, viz., the amount to be allowed as solicitor's fees, and while the sum of \$750 was under consideration, the solicitor for appellant stated, "I am perfectly willing it should be allowed if it is to go to the solicitor." The hearing was before a master in chancery to whom the cause had been referred. In the objections to the master's report, while specific objection is made to the finding as to the amounts allowed for taxes, no objection whatever is made to the finding as to solicitor's fees. The master found that the amount decreed was a reasonable amount to be allowed as solicitor's fees.

From the foregoing it is apparent that the decree must be affirmed. The proof was sufficient; the appellant, by reason of the statement of his counsel at the hearing, is precluded from questioning the amount, and there having been no such question presented to the master by objection, or to the chancellor by exception, it could not, in any event, be urged here.

The decree is affirmed.

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1. *VARIANCE—Pleadings and Proofs.*—Under the common counts for goods, etc., sold and delivered, no recovery can be had, except for goods, etc., sold and delivered.

Assumpsit. Consolidated common counts. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Verdict and judgment for defendant; appeal by plaintiff. Heard in this court at the March term, 1899. Reversed and remanded. Opinion filed April 17, 1899. Rehearing denied.

RALPH ROBER CROCKER and SAMUEL B. KING, attorneys for appellant.

THORNTON & CHANCELLOR, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment rendered in an action of assumpsit by appellee against appellant. The declaration contains the common count for goods, wares and merchandise sold and delivered, alleging an indebtedness of \$1,500 for such sale and delivery. Then follows a blank printed form of the consolidated common counts, commencing thus: "And, whereas, also, the said defendant, afterward, to wit, on the same day and year, and at the place aforesaid, ——— indebted to the said plaintiff in the further sum of ——— dollars, of like lawful money as aforesaid for," etc. No indebtedness whatever is alleged in the form of the consolidated counts, the blank space in the commencement of the count, left for the insertion of the amount of indebtedness, not being filled in, but left blank, as above shown. In short, the declaration contains only one count, namely, that for goods, etc., sold and delivered.

Appellee's only evidence was of money advanced and personal services rendered for appellant; no proof was offered of any other cause of action. When appellee commenced to introduce evidence of personal services rendered by him for appellant, the latter's counsel objected, on the specific ground that the proof was inadmissible; that the only count in the declaration was for merchandise sold and delivered; but the objection was overruled. It is too plain for argument, that under the common count for goods, etc., sold and delivered, no recovery can be had, except for goods, etc., sold and delivered. 1 Ch. Pl., 9 Am. Ed., 345, *et sequens*.

No proof whatever was offered of the only cause of action alleged. The judgment will be reversed and the cause remanded.

George S. Steere v. H. Alexander Stewart.

1. **HARMLESS ERROR—Exclusion of Evidence.**—Where there is no prejudice resulting from the exclusion of evidence, the verdict must be sustained.

Assumpsit, for physician's services. Trial in the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed April 17, 1899.

Statement of the Case.—This was an action in assumpsit by appellee, who is a physician, to recover for professional services rendered at the request of appellant and upon his promise to pay therefor. There was a conflict in the evidence as to the value of the services rendered by appellee. The trial below resulted in verdict and judgment for appellee in the amount of \$89.

H. W. WAKELEE, attorney for appellant.

SUMNER C. PALMER, attorney for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

Appellant complains of rulings of the court below in admission and exclusion of evidence, and in refusing certain instructions tendered by appellant. It is also complained that the verdict is excessive in amount.

The evidence as to the usual and customary fees of physicians for like services was sufficient. The evidence first presented in this behalf was in response to questions as to "reasonable" or "fair" charges. But appellee in his later testimony stated that "the usual charge in cases of this kind for a visit is \$5" and "I am giving \$100 as an average charge for a surgeon."

It is objected that answers were excluded to questions put to Dr. Ridlon as to the probable effect upon the patient, of such treatment as was followed by appellee. But there

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was no prejudice resulting from such exclusion, for afterward Dr. Ridlon was permitted to testify, "the treatment described by Dr. Stewart would have no effect upon the real cause of the difficulty."

Without going into needless discussion of the instructions, it is sufficient to say that we find no error in the rulings of the court in that behalf.

The evidence was conflicting as to the value of the services rendered by appellee.

We can not say that the verdict is not sustained by the evidence.

Judgment affirmed.

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Lake Street Elevated R. Co. v. Harriet K. Carmichael.

1. **CORPORATIONS—Act Through Agents.**—Corporations necessarily act through agents and when in the course of the authorized business of a corporation its president assumes to act for it, his acts will be presumed to be authorized unless it is otherwise affirmatively shown, and persons dealing with him in good faith will be protected.

2. **SAME—Ultra Vires and Ratification.**—When an officer of a corporation performs an act which he lacks the power to perform, such lack of power may be cured by a ratification of such act by the corporation.

3. **RATIFICATION—By Corporations Need Not be by Vote or Resolution.**—The assent to and ratification by a corporation of the lawful contracts of its president made in its name and done within the scope of its business is not required to be shown by vote or resolution of the board of directors. Such assent and ratification by a corporation, as in the case of individuals, may be shown and implied from facts and circumstances as well as by express conduct.

4. **ULTRA VIRES—Not to Commit Injustice and Fraud.**—A plea of *ultra vires* can not be successfully used to commit an injustice or a fraud and in this respect it makes no difference whether it is interposed by or against a corporation.

5. **SAME—Guaranteeing Promissory Notes.**—Where a corporation in acquiring land for a right of way caused an employe to give his note for purchase money, and guaranteed payment of the same itself, it can not, in a suit upon the guaranty, successfully plead *ultra vires*.

6. **PUBLIC POLICY—Corporations to be Kept Strictly Within Their Chartered Powers.**—Public policy requires corporations to be kept strictly within their chartered powers, yet good faith to third parties who

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have dealt with them without accurate knowledge of the extent of their powers and principles of justice demand that when, under the sanction of a contract lawful and proper in itself, they have received and appropriated to their legitimate uses all of the subject-matter of the contract, they shall render unto the other contracting party that which by the contract, though *ultra vires*, they agreed to do for him.

7. **ESTOPPEL**—*To Deny the Validity of a Beneficial Instrument.*—Where a party has accepted and received the benefits of a contract he estops himself from denying in the courts the validity of such contract.

Assumpsit, on a guaranty. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Verdict and judgment for plaintiff by direction of the court; appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed May 2, 1899.

KNIGHT & BROWN, attorneys for appellant, contended that a contract made with the officers of a corporation, not authorized, is not binding. *City of Chicago v. Lithographing Co.*, 6 Ill. App. 560.

The general rule is that a corporation is impliedly prohibited from guaranteeing the debt of another. *Dobson v. More*, 164 Ill. 110.

When a party makes, with the officers of a corporation, an illegal contract beyond the power of the corporation, such third party can not recover, because he acts with knowledge that the officers have exceeded their power, and between him and the corporation or its stockholders, no amount of ratification of this authority will make it valid. *Lucas v. White Line T. Co.*, 70 Ia. 546; *Durkee v. People*, 53 Ill. App. 396; *Dobson v. More*, 164 Ill. 110.

Proof that the instrument purporting to be made by the appellant corporation was signed by an officer of the corporation does not show that it is the note of the corporation without proof that it was made by its authority. *People's Bank v. Church*, 109 N. Y. 512.

WILLARD & EVANS, attorneys for appellee.

There was proof of subsequent ratification of the act of the president by acquiescence therein and retention of benefits flowing from the act. *Smith v. Smith*, 62 Ill. 493;

McDonald v. Chisholm, 131 Ill. 273; Atwater v. American Exchange Bank, 152 Ill. 605; Snyder Bros. v. Bailey, 165 Ill. 453; Ashley Wire Co. v. Ill. Steel Co., 164 Ill. 149; Glover v. Lee, 140 Ill. 107; Glover v. Wells, 40 Ill. App. 354; Union Mutual Life Ins. Co. v. White, 106 Ill. 67; Melledge v. Boston Iron Co., 5 Cush. (Mass.) 175; Beach on Private Corporations ('91), Sec. 203; Cook on Stockholders, 2d Edition, Sec. 716; 1 Morawetz on Corporations, Secs. 538, 618, 630.

The plea of *ultra vires* is not availing where the corporation has received and retains the benefit of an executed contract.

The guarantee in question was executed as part of the consideration for the conveyance by appellee, at the request and instance of appellant, of certain real estate. The appellant has since retained such real estate and the benefit of such conveyance. It is therefore now estopped from asserting that the giving of said guaranty was *ultra vires*. Darst v. Gale, 83 Ill. 137; Bradley v. Ballard, 55 Ill. 413; Kadish v. G. E. L. & B. Assn., 151 Ill. 531; Standard Brewery Co. v. Kelly, 66 Ill. App. 273; Nat. Brewing Co. v. Ahlgren, 63 Ill. App. 478; Heims Brewing Co. v. Flannery, 137 Ill. 309; Railroad Company v. Howard, 7 Wall. (U. S.) 412, 413; The Rider Life Raft Co. v. Roach, 97 N. Y. 381.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The appellee brought suit upon the guaranty of a promissory note, made as follows:

"CHICAGO, February 23, 1894.

On or before one year after date I promise to pay to the order of Harriet K. Carmichael twenty-five hundred dollars, with interest at the rate of 6 per cent per annum, payable annually at the office of William D. Kerfoot & Company, Chicago, with interest at 7 per cent per annum after maturity, value received.

JOHN H. MILLER."

(On the back of said note:)

"For value received the Lake Street Elevated Railroad

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Company hereby guarantees the prompt payment of the within note at its maturity.

LAKE STREET ELEVATED RAILROAD COMPANY,
By John A. Roche,
President.”

To the suit there was filed a verified plea of the general issue, and a plea of *ultra vires*. There is very little dispute about the facts. It was admitted by appellant, at the trial, that John A. Roche was president of the appellant corporation at the time the note and guaranty were made, and that the signature to the guaranty was made by him, but such admission was coupled with a denial of his authority to sign it.

Upon trial of the issues, a verdict, directed by the court, and a judgment in favor of appellee for \$2,841.70 was had, and this appeal has followed.

The appellant was chartered for the purpose of constructing, maintaining and operating a railway (elevated) between points within Cook county. For the right of way of one of its proposed branches, appellant needed to acquire part of certain lands belonging to appellee. She was unwilling to sell a part of the land, and it was arranged that appellant should buy the whole, at a price agreed upon, partly in cash and partly on time, and the note in question represents the amount of the deferred payment.

At the request of appellant's attorneys who negotiated the transaction, all the premises were conveyed to Miller, the maker of the note, who was a clerk in the office of said attorneys, and he gave a trust deed back to secure the note. This was done, as testified, so that appellant need not appear to have given a mortgage.

The trust deed, by agreement, was drawn so as to cover only that part of the premises upon which the elevated structure was not to be built. To take the place of the security, which a trust deed upon the whole of the premises would afford for the deferred payment, it was agreed, between appellant's attorneys and appellee, that the trust deed should cover only the part of the premises upon which the road was not to be built, and that appellant's guaranty

of the note should be substituted for and stand in the place of trust deed security upon the part of the premises upon which the road was to be built, and in pursuance of such agreement the guaranty in question was made.

Miller paid no part of the cash consideration for the land, and he soon conveyed all the premises to the appellant, without receiving any consideration therefor.

The deed to Miller and his trust deed to secure the note, bear even date with the note, and were both recorded on the same day, March 13, 1894, that the deed from Miller to appellant is dated.

From a letter written to appellee's agents, by one purporting to be secretary of appellant, it is shown that appellant could not pay the note at maturity, but was willing to pay the interest if an extension should be granted, and interest for one year was paid on the note by appellant. It also appears by a later letter from the president of the appellant, that all the premises purchased of appellee had become included in and covered by a general mortgage made by appellant upon its property.

The question arising out of the argued lack of authority by the president of the appellant corporation to execute the guaranty, is not one of much difficulty. The power of appellant, under the charter, to build a railway along the line where appellee's premises were located, is not questioned. Having such power, its further right and power to acquire, by grant or license, land upon which to construct its road follows by implication, and does not seem to be contended against, and having the power to acquire and receive land, appellant may pay therefor and execute all necessary contracts in connection therewith.

Corporations necessarily act through agents, and when in the course of the authorized business of a corporation its president assumes to act for it, his acts will be presumed to be authorized, unless it is otherwise affirmatively shown, and persons dealing with him in good faith will be protected. *Glover v. Lee*, 140 Ill. 107; *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149.

If, however, there were anything lacking in the original power of the president in the premises there has been such ratification of his act as to cure all such lack of power in him in the first instance. We need not repeat the evidence.

The assent to and ratification by a corporation of the lawful contracts of its president made in its name and done within the scope of its business, is not required to be shown by vote or resolution of the board of directors. Such assent and ratification by a corporation, as in the case of individuals, may be shown and implied from facts and circumstances, as well as by express conduct. *Atwater v. American Exchange Nat. Bank*, 152 Ill. 605; *Louisville, N. A. & C. Ry. Co. v. Carson*, 51 Ill. App. 552, 151 Ill. 444; *National Brewing Co. v. Ahlgren*, 63 Ill. App. 475.

The plea of *ultra vires*, impliedly admitting that the guaranty was the act of appellant, avers that the guaranty was made for the accommodation of Miller and to secure his individual indebtedness, and denies the lawful authority or power of appellant to bind itself as security for, or guarantor of, the debt of another.

The undisputed evidence dissipates all ground for contention that the guaranty was given for the accommodation of Miller. The purchase of the land was not made by Miller. As between Miller and appellant, Miller was but a conduit for the title to pass through. The transaction was the appellant's and not Miller's, from inception to conclusion. The negotiations were begun and the agreement concluded by appellant. Miller never had any real interest in the transaction, and no one but appellant reaped any of its benefits. Having secured the full benefit of the transaction appellant ought not to be permitted by a plea of *ultra vires* to defraud appellee out of her land, and her money, too. A plea of *ultra vires* can not be successfully advanced to commit injustice and fraud, and in this respect it makes no difference whether it is interposed by or against a corporation. *Darst v. Gale*, 83 Ill. 136; *People v. Suburban R. R. Co.*, 178 Ill. 594.

The evidence is undisputed, that the land was conveyed and a mortgage upon a part of it for the deferred payment

of the purchase price waived, upon the faith of appellant's guaranty. Now, to allow the plea would be to hold appellant may acquire land which it is authorized by its charter to acquire, and to keep it without paying for it, merely because its contract to pay for it took a form which it says it had no power to enter into.

It can not be successfully claimed that appellant's contract of guaranty is void or illegal, but the claim is, merely, that it is *ultra vires*, which, applied to the facts of this case, means that appellant having lawfully acquired, as it might, appellee's land and agreed to pay for it, and afterward held and mortgaged it as his own, shall now be excused from paying for it, because its contract to do so is in form an undertaking to pay the debt of another.

In determining the effect to be given to a plea of *ultra vires*, interposed by a corporation to avoid the result upon itself of an executed contract whereof it has received the full benefit, courts look more to substance and justice, and what the plain rules of good faith and simple and common honesty demand, than to mere form.

It is quite true that public policy requires corporations to be kept strictly within their chartered powers, yet good faith to third parties who have dealt with them without accurate knowledge of the extent of their powers, and the plainest principles of natural justice demand that when under sanction of a contract, lawful and proper in itself, they have received and appropriated to their legitimate uses all of the subject-matter of the contract, they shall render unto the other contracting party that which by the contract, though *ultra vires*, they agreed to do for him.

The effect of all the decisions upon this question is said in *Kadish v. Garden City, etc.*, Ass'n, 151 Ill. 531 (same case, 47 Ill. App. 602), to naturally rest upon the rule laid down in 2 *Parsons on Contracts*, 790, that "where a party has accepted and made his own the benefit of a contract, he has estopped himself from denying in the courts the validity of the instrument by which those benefits came to him."

There are many cases in Illinois bearing upon this sub-

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ject, and among them are Bradley v. Ballard, 55 Ill. 413; Chicago Building Society v. Crowell, 65 Ill. 453; Darst v. Gale, 83 Ill. 136; Heims Brewing Co. v. Flannery, 137 Ill. 309; Kadish v. Garden City, etc.; Assn., 151 Ill. 531; Nat. Brewing Co. v. Ahlgren, 63 Ill. App. 475; Standard Brewery v. Kelly, 66 Ill. App. 267; Brewer & Hoffman Co. v. Boddie, 80 Ill. App. 353.

We observe no material error in the record, and nothing more that requires comment.

The judgment of the Superior Court is accordingly affirmed.

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Polish Roman Catholic Union v. Anna Warczak.

1. **QUESTIONS OF LAW—Not To Be Submitted to a Jury.**—Where the evidence in behalf of both parties shows that the material allegations of both parties are uncontroverted, issues of law only are left to be disposed of by the court.

2. **BENEFICIARY SOCIETIES—Constitution a Part of the Contract.**—Where a beneficiary society is made up of subordinate societies, the constitution of the principal society becomes a part of a member's contract of insurance so far, at least, as his rights are based on his membership in the principal society.

3. **SAME—Forfeiture of Membership.**—Until a member is in default he can not be suspended or his rights forfeited. It is incumbent upon the association to prove that unpaid assessments were legally made and due, in accordance with the constitution of the branch society, before he can be rightfully suspended.

Assumpsit, on a beneficiary certificate. Trial in the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed April 17, 1899.

CZARNECKI & KORALESKI, attorneys for appellant.

When the constitution of a beneficiary association provides for the existence of a body composed of supreme, intermediate and subordinate bodies, analogous to the existing form of our government and the individual members appear and act in a dual or triple character, courts of justice have

been sorely pressed and puzzled, and there appears considerable variance between the final adjudications in the various States of our Union. Yet from all this there have been evolved some well settled principles, and for the purposes of this suit it is deemed proper that a few applicable to the case at bar be here enumerated.

Benefit societies in law are mutual life insurance companies. *Ass'n v. Robinson*, 147 Ill. 138; *Erdmann v. Mut. Ins. Co.*, 44 Wis. 376.

Their certificates or contracts are insurance contracts (*Comm. v. Wetherbee*, 105 Mass. 149, *Bacon*, par. 162), and are to be interpreted as other insurance contracts. *Cluff v. Mut. B. L. Ins. Co.*, 99 Mass. 325; *Wiggins v. K. of Pythias*, 31 Fed. Rep. 124.

While the scheme of organization provides for supreme, intermediate and subordinate bodies the membership forms but one body. *Saunders v. Robinson*, 10 N. E. Rep. 815.

The rights and powers of the officers and members of the associations or lodges, superior or subordinate, are regulated by their articles of association or constitution and by-laws, which constitute the contract of the members with the society and each other, and by the provisions of which they undertake to be bound. *Bacon on Benefit Societies*, 2d edition, page 107, note 2, page 145, and cases cited.

The by-laws of a society are binding upon all members, and all are conclusively presumed to know them. *Bauer v. Sampson Lodge*, 102 Ind. 262; *Life Ins. Co. v. Foote*, 79 Ill. 362; *Wash v. Johnson*, 95 Ill. 248; *Angell & Ames on Corp.* 359.

The contract (which is one of insurance) is to be found in the certificate, if one is issued, the articles of association, charter and by-laws, and the statutes of the State of the domicile of the corporation. *Mass.*, etc., *Ben. Soc. v. Burkhardt*, 110 Ind. 192, citing cases; *Alexander v. Parker*, 144 Ill. 355; *Eastman v. Provident M. Relief Ass'n*, 62 N. H. 553; *Van Bibber v. Van Bibber*, 82 Ky. 350; *Splawn v.*

Chew, 60 Texas. 533; *McMurry v. Sup. L., etc.*, 20 Fed. Rep. 107.

1. That officers of benefit societies are special agents, see Bacon, par. 127-145, 2d Ed., p. 206-231; that the articles of association define and limit their power and duties (*Hendon v. Triple Alliance*, 45 M. A. 426), and when so defined by articles of association the scope of the agent's powers must always be considered as disclosed, see Morawetz on Corp., par. 580-591; Story on Agency; and that such limitation must be known to the member, see *Hellenberg v. District No. 1*, 94 N. Y. 580; *Eastman v. Providence, etc., Asso.*, 62 N. H. 555; Morawetz on Corp.; Bacon, p. 206.

2. Subordinate societies may be principals in certain transactions, and agents in others, and so are governed by different rules as they act in one capacity or the other. *Supreme Lodge A. O. U. W. v. Zuhlke*, 129 Ill. 288.

3. Officers of a mutual insurance or fraternal beneficiary society, being special agents, can not waive the by-laws, especially where these relate to the substance and essence of the contract. *McCoy v. Rom. Cath., etc., Co.*, 25 N. E. Rep. 289; Bacon on Benefit Societies, Note 3, page 218, Vol. 1; *Swett v. Society*, 7 Atl. Rep. 394; *Brewer v. Chelsea Ins. Co.*, 14 Gray, 209; *Lyon v. Supr. Assembly, etc.*, 26 N. E. Rep. 236.

And if he acts in a manner not authorized by the articles of association his acts will not be binding. Morawetz on Corp., p. 582.

Prompt payment or time is of the essence of the contract. *Kellner v. Mut. L. Ins. Co.*, 43 Fed. 623; *Richardson v. Mut. L. Ins. Co.*, 18 S. W. Rep. 165; Bacon on Benefit Societies, 2d Ed. Note, page 702.

4. Subordinate societies can not waive the requirements of the laws of the order in regard to assessments or other essential contractual matters. *Gr. L. A. O. U. W. v. Jesse*, 50 Ill. App. 101; *Borgraefe v. S. L. K. of H.*, 22 Mo. App. 127; *Lyon v. Supreme Assembly, etc.*, 26 N. E. Rep. 236.

5. Officers of the subordinate lodges are special agents

whose authority is defined in the laws of the society, and as this authority is equally well known to the member and the officer, acts beyond the power of the latter will not bind the superior. *Harvey v. G. L., A. O. U. W.*, 50 Mo. App. 472; *Sup. L. K. of H. v. Keener*, 26 S. W. Rep. 1084.

The general doctrine of waiver and estoppel applies to mutual or fraternal insurance contracts. *Bacon*, par. 148, 2d Ed. p. 237; *Borgraefe v. K. of Honor*, 22 Mo. App. 127; *Karcher v. S. Lodge*, 137 Mass. 368; *Hall v. S. Lodge*, 24 Fed. Rep. 450; *Rood v. Railway, etc., Ass'n*, 31 Fed. 62.

The contract of a mutual benefit society is a unilateral contract, and if a failure to pay assessments promptly creates a forfeiture, such forfeiture is self-executing, 71 Ill. App. 366, 174 Ill. 279; *Lehman v. Clark*, 51 N. E. Rep. 222.

JAMES H. WESTCOTT, JR., attorney for appellee, contends that the following are well settled principles of law, governing benefit societies.

Suspensions, expulsions and forfeitures must be made in accordance with the constitution or by-laws of the defendant union or its subordinate societies. *High Court v. Zak*, 136 Ill. 190, citing *Society v. Weatherby*, 75 Ala. 248; *Dolan v. Court G. M.*, 128 Mass. 439; *Olery v. Brown*, 51 Howard Pr. (N. Y.) 92.

A certificate of membership in the union makes a *prima facie* case, and where the defendant denies the good standing of a member at his death, it has the burden of proving the fact. *Railway Con. Mutual Aid and Benefit Association v. Loomis*, 43 Ill. App. 599; *Order of Chosen Friends v. Austerlitz*, 75 Ill. App. 74; *High Court v. Zak*, 136 Ill. 190; *Bacon on Benefit Societies*, Sec. 414; *N. W. Traveling Men's Ass'n v. Schauss*, 148 Ill. 308.

The loss of good standing must be shown by the minutes, proceeding, or record of the defendant, and not by the oral statements of the members or officers. *High Court v. Zak*, 136 Ill. 190; *Society v. Weatherby*, 75 Ala. 248.

The defendant society must prove that assessments were

made, and also that they were made in accordance with its constitution or by-laws, before they can suspend. *Order Chosen Friends v. Austerlitz*, 75 Ill. App. 74; *Shea v. Mass. Ben. Ass'n*, 160 Mass. 289.

The defendant must further prove, in order to make a suspension, expulsion, or forfeiture binding and legal, that it gave the member notice as provided in the by-laws or constitution. *Mueller v. U. S. M. A. Ass'n*, 51 Ill. App. 40; *Supreme Lodge v. Dalberg*, 37 Ill. App. 145; 138 Ill. 508; *Supreme Lodge v. Zuhlke*, 30 Ill. App. 102; *Gregir v. McLin*, 78 Ky. 232; *Scheu v. Grand Lodge*, 17 Fed. Rep. 214.

And notice in some form is necessary, though the by-laws and constitution make no provision for notice, and it must be personal. *Ry. Cond. Mut. A. & B. Ass'n v. Loomis*, 43 Ill. App. 599; *N. W. Trav. Men's Ass'n v. Schauss*, 148 Ill. 304.

A strict construction is always made of all provisions for forfeitures, and the one who insists on it must make clear proof thereof. *Order Chosen Friends v. Austerlitz*, 75 Ill. App. 74; *Sup. Lodge v. Abbott*, 82 Ind. 1; *Folmer's Appeal*, 87 Pa. St. 133.

When assessments are duly paid to the proper local officer, it makes no difference to the rights of the member or the beneficiary that the money is not remitted to the Grand Lodge. *Brotherhood of R. R. Brakeman v. Knowles*, 39 Ill. App. 47.

When defendant denies liability, there is no need of proof of death being made by the plaintiff. *Met. Safety Fund Acc. Ass'n v. Windover*, 137 Ill. 417; *Suppiger v. Cov. Mut. B. Association*, 20 Ill. App. 595; *New Home L. Ass'n v. Hagler*, 23 Ill. App. 460.

Receipt of dues after knowledge that the condition of the policy had been broken would amount to a waiver of the condition. *N. W. Mut. Life Ins. Co. v. Amerman*, 119 Ill. 331; *Com. Ins. Co. v. Spankneble*, 52 Ill. 53; *Reaper Ins. Co. v. Jones*, 62 Ill. 458; *Lycoming Ins. Co. v. Barringer*, 73 Ill. 230.

When the grand lodge has no method for the expulsion,

suspension or forfeiture of a delinquent member in its constitution or by-laws, but controls societies as societies, then the subordinate society has control of the suspension, expulsion or forfeiture of their members, and the society must act according to its constitution or by-laws, and if it does not, the expulsion, suspension or forfeiture is illegal and not binding on either the members or his beneficiary. District Grand Lodge v. Cohn, 20 Ill. App. 335.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

Numerous alleged errors as to admission and exclusion of evidence, remarks of the court during the trial, refusal of instructions, and that the verdict is against the evidence, are ably and exhaustively argued by appellant's counsel, but we are relieved from their discussion in this opinion by a statement of appellant's counsel in their brief, viz.:

"The evidence in behalf of both parties shows that the material allegations of both parties were uncontradicted and uncontroverted, and when both sides rested, issues of law, not of fact, were left to be disposed of and the court erred in not taking the cause from the jury and instructing them to find the issues for the defendant."

A careful consideration of the record as presented by the abstract also leads us to the conclusion that it only presents for consideration a question of law, viz.: Was the plaintiff entitled to recover or not? and that this should have been determined by the learned trial court, and not submitted to the jury, as it was.

Appellant was, on and prior to April 18, 1894, a fraternal and benevolent society, not for profit, incorporated under the laws of this State, and made up of subordinate or branch societies, which were also incorporated, including branch No. 147, known as St. Adelbert Society, of which Thomas Warczak was a member as No. 20 thereof, and in good standing prior and up to April, 1896. April 18, 1894, appellant issued a certificate or statement to said Warczak, to the effect, in substance, that on compliance with articles 13, 14, 16 to 20 of its constitution, he was entitled to all bene-

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fits and relief which should arise for each member of the death treasury of appellant.

The constitution of appellant contains, among others, the following provisions, viz. :

“ART. V.

JOINING THE UNION.

Sec. 1. Any Polish Roman Catholic society having its own constitution and charter may become a part of the Union.

Sec. 2. A society intending to join the Union shall make an application to the secretary of the said Union and together with it send a copy of its constitution as approved by its rector.”

(Also other matters not here material.)

Also “Art. 6, Sec. 4. When a society upon being notified by the general secretary to pay its dues, fails to do so, it loses all its privileges to the Union unless this disability be due to some unavoidable and unforeseen occurrence which harms all its members.”

“ART. XIV.

REGULATIONS PERTAINING TO THE MORTUARY REPORT.

Sec. 1. Funds of the Union are made up — (stating how).

Sec. 2. Societies consisting of no less than ten regular members and a collector may belong to the mortuary fund of the Union.

Sec. 3. The Union has no transactions with individual persons, but only through the societies to which they belong.

Sec. 8. In case of the death of a regular member, the mortuary fee amounts to \$600, and in case of death of the wife of a member the mortuary fee amounts to \$300, which amount the management of the Union shall pay to the widow, widower, children or relatives of the deceased, as the case may be, within sixty days of making the application to the Union.

Sec. 10. A society which shall not pay the amount assessed upon it within thirty days from receiving the notice from the general secretary, shall forfeit all rights to the mortuary fee.

Sec. 12. Any one belonging to more than one society of the Union can be recorded and belong only with one

society to the Union, and shall only pay its necessary assessments and only from this one, pay the annual tax of twenty-five cents.

Sec. 13. Each society pays the monthly assessments which are levied upon it *pro rata*."

* * * * *

"Suggestions: The societies should send through their delegate, their receipts of money paid to the Union."

* * * * *

"ART. XV.

DUTIES OF COLLECTOR.

Each society belonging to the Union shall choose for itself a collector. The collector as an officer of the society shall be paid by the society and is only responsible to the society, which shall regulate all his doings. The Union is not responsible for the mistakes made by the collector. The collector, before beginning his duties, must sign a legal bond, made out for the name of the treasurer of the Union, in the sum of \$1,200. The collector shall notify the general secretary of his election, and send to him an affirmation, signed by the management of the society. The collector shall send out all moneys by postal money order, or check, made upon the name of the treasurer of the Union. He shall furnish the general secretary with a complete list of members of his society paying assessments to the mortuary fund, and he also shall notify him of the installment of and the expelling of members.

In case of death of a member, the collector shall within fifteen days send a written notice of it to the general secretary, which notice shall be signed by the president and secretary of the society and the local rector."

The constitution of the St. Adelbert Society has, among others, the following provisions, viz.:

"ARTICLE IX.

DUTIES OF FINANCIAL SECRETARY.

Par. 1. It is the duty of the financial secretary to receive dues, contributions, fines and other society incomes, enter the same in a book, and keep such accounts in good order.

Par. 2. All money collected at a meeting shall be by him counted and given to the treasurer upon his signing a receipt.

Par. 3. The financial secretary informs each member

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of a quarterly meeting, also of the amount of his indebtedness.

Par. 4. He shall inform the recording secretary and president, after each meeting, of the names of members who have not paid their debts.

ARTICLE XVII.

WITHDRAWAL FROM AND STRIKING NAME OFF FROM SOCIETY."

Paragraphs 1 to 8 not material.

"Par. 9. If any member is in arrears for monthly dues, tickets, special collections of the society, longer than six months, his name is stricken thereby from the roll of membership.

ARTICLE XXII.

DUTIES OF MEMBERS.

Paragraphs 1 to 9 not material.

"Par. 10. Each member is obliged to pay all moneys due each and every month promptly.

Par. 11. Any member unable to pay all amounts due at the end of three months, must make a request in writing to the society, which then may grant him an extension of time in which to pay."

"ARTICLE XXIV.

FUNERAL BENEFITS AND DUTIES."

Par. 1. Omitted.

"Par. 2. Costs of funeral not to exceed \$60."

Paragraphs 3, 4, 5 omitted.

"Par. 6. In the event of the death treasury of the Roman Catholic Union collapsing, and in this event alone, the society will pay to the family of a deceased brother \$200, and on the death of a wife the husband will receive \$100."

There are also provisions for sick benefits to the members under certain conditions.

Warczak died November 6, 1896, and appellee is his widow and beneficiary. The last payment of dues and assessments made by Warczak was on September 13, 1896, which, it is claimed, and is proven, was returned to him. The society paid for him in April and May, 1896. Appellant received no money for his dues after June 16, 1896, at which date, it is claimed, he was suspended from the St. Adelbert Society for non-payment of assessments, but there

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stitution of the branch society before he could be right-ly suspended. Order of Chosen Friends v. Austerlitz, 15 Ill. App. 74-8, and cases there cited.

No such proof was made. Moreover, it is uncontroverted that in April and May, 1896, the St. Adelbert Society paid all dues and assessments for Warczak. Par. 9 of Art. 17 of the society provides only that his name shall be stricken from the roll of membership when a member is in arrears longer than six months. So that, if there were dues and assessments due for each month after May (which is not shown) Warczak would only have been in arrears, at the time of his death, five months.

We are therefore of opinion that the evidence on behalf of appellant presented no defense, and, instead of submitting the case to the jury, the learned trial judge should have directed a verdict for appellee. It follows that, if we are correct in this conclusion, there is no reversible error in the refusal of any of appellant's instructions, and the judgment is affirmed.

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1. PRACTICE—*Arrest of Judgment After Verdict.*—After verdict, on a motion in arrest of judgment, the court will presume that every material fact alleged in the declaration, or fairly inferable from what is alleged, was proved on the trial.

2. SAME—*Question of Joint and Several Liability.*—Under the declaration and facts in this case, the question as to joint liability was properly preserved by the motion in arrest of judgment, and is before the Appellate Court upon a proper assignment of error.

3. MASTER AND SERVANT—*Joint Liability.*—A judgment can not be sustained against the master and servant jointly in a case where the master is liable only upon the doctrine of *respondeat superior*. The act of a servant is not the act of the master unless the act complained of is directed or adopted by the master.

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is no record shown of any action by the society suspending him. It appears, however, that a vote of the society was taken that he be suspended for non-payment of assessments, but what assessments, does not appear. When dues and assessments were payable by a member does not appear from the abstract. Each branch, or subordinate society, was required to pay to appellant monthly assessments; but, as we have seen, appellant had no transactions with members, but did its business only through the societies to which they belonged. It follows, from this fact, and the further fact that there appears to be no provision in appellant's constitution under which a member forfeits or loses his rights to the mortuary fund, that, in determining the rights of a member of his beneficiary thereto, resort must be had to his relations to the branch or subordinate society.

The appellant union being made up of branch or subordinate societies, the constitution of the St. Adelbert Society, of which Warczak was a member, became a part of his contract of insurance with appellant, in so far, at least, as his rights are based on his membership in the St. Adelbert Society. Bacon on Benefit Soc., Sec. 161 a, and 236; Mas., etc., Ben. Soc. v. Burkhart, 110 Ind. 192; Alexander v. Parker, 144 Ill. 355.

It follows from what has been stated as to the relations of appellant to Warczak and the branch society, and the provisions of appellant's constitution, that appellee made a *prima facie* case, entitling her to a recovery, and it was incumbent on appellant, in order to meet this case, to show that Warczak had, in some way, forfeited his rights under the certificate of insurance, or because of some provision in the constitution of appellant or the St. Adelbert Society. It is not shown that any money was due from Warczak which he did not pay or offer to pay, and, that being the case, any effort by the St. Adelbert Society to forfeit his rights or suspend him was wrongful and of no effect. Until he was in default he could not be suspended or his rights forfeited. It was incumbent on appellant to prove that assessments were made and due, in accordance with the con-

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stitution of the branch society before he could be rightfully suspended. Order of Chosen Friends v. Austerlitz, 75 Ill. App. 74-8, and cases there cited.

No such proof was made. Moreover, it is uncontroverted that in April and May, 1896, the St. Adelbert Society paid all dues and assessments for Warczak. Par. 9 of Art. 17 of the society provides only that his name shall be stricken from the roll of membership when a member is in arrears longer than six months. So that, if there were dues and assessments due for each month after May (which is not shown) Warczak would only have been in arrears, at the time of his death, five months.

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Action in Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Verdict

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and judgment for plaintiff; appeal by defendants. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded. Mr. Justice SHEPARD dissenting. Opinion filed May 2, 1899.

FITCH & DUHA, attorneys for appellants.

If a declaration omits to allege any substantive fact which is essential to a right of action, and which is not implied in, or inferable from the finding of those which are alleged, a verdict for the plaintiff does not cure the defect. *Bowman v. The People*, 114 Ill. 474; *Ayers v. The City of Chicago*, 111 Ill. 406.

If a declaration be so defective that it will not sustain a judgment, that may be taken advantage of on a motion in arrest of judgment or on error. *Kipp v. Lichtenstein*, 79 Ill. 358.

An action for a tort against several defendants can not be maintained where in legal contemplation the act complained of could not have been committed by several persons, but could only be considered a tort of each; in such case a separate action against the actual misdoer only, or against each separately, must be brought. *Blake v. City of Pontiac*, 49 Ill. App. 544.

Where a master is made liable for the negligent act of his servant, solely upon the ground of the relationship between them, under the doctrine of *respondeat superior*, and not by reason of any personal share in the negligent or wrongful act, by his presence or express direction, he is liable severally only, and not jointly with the servant. *Warax v. Cincinnati, N. O. & T. R. R.*, 72 Fed. Rep. 637; *Landers v. Felton*, 73 Fed. Rep. 311.

The rule is that when the employe is exercising a distinct and independent employment and is not under the immediate control, direction or supervision of the employer, the latter is not responsible for the negligence or carelessness of the employe. *Wadsworth H. Co. v. Foster*, 50 Ill. App. 514; *Hale v. Johnson*, 80 Ill. 185; *Wadsworth H. Co. v. Foster*, 168 Ill. 514; *Arasmith v. Temple*, 11 Brad. 39.

JOHN F. WATERS, attorney for appellee.

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A servant is personally liable to a third person for negligently driving the master's horses or carriage over him, even though the master is also liable. *Shearman & Redfield on Negligence* (3d Ed.), Par. 112, page 143. Citing *Phelps v. Waite*, 30 N. Y. 78; *Montforte v. Hughes*, 3 E. D. Smith, 591; *Wright v. Wilcox*, 19 Wend. 343; *Hewett v. Swift*, 3 Allen, 420.

Every one, whether he is principal or agent, is responsible directly to persons injured by his own negligence in fulfilling obligations resting upon him in his individual character. These obligations are those which the law imposes upon all persons, independent of contract. No man increases or diminishes his obligations to strangers by becoming an agent; but if in the course of his agency he comes in contact with the person or property of a stranger he is liable for any injury he may do to either by his negligence, in respect to duties imposed by law upon him in common with all other men. *Shearman & Redfield on Negligence* (3d Ed.), page 143, Par. 112, and authorities there cited.

If a person commit an unlawful act under the direction of another, that fact will not shield him from responsibility, but both are equally liable to the injured party. *Johnson v. Barber*, 5 Gilm. 425.

One who superintends gratuitously work done on the land of another, and through whose negligence, as well as that of the other, damage is done to a third person by the work, is liable jointly with the other person therefor. *Hawkesworth v. Thompson*, 98 Mass. 77.

The rule of law is that all who contribute to a tort, even by their wills alone, and especially, therefore, all who contribute by their acts, even though in an inferior degree, are, whether they are personally present or absent at the doing, liable to the person injured, each for the entire damage. *K. S. & R. R. Co. et al. v. Horan*, 131 Ill. 300. Citing *Bishop's Non-Contract Law*, Sec. 522.

Where the injury is the result of the joint operations of negligence of several parties, either party to this negligence may be made answerable for the entire injury. All who

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contribute to a tort are liable to the person injured, each for the entire damage, and it can not be apportioned. *L. E. W. R. R. Co. v. Middlecoff*, 150 Ill. 37.

If several are jointly bound to perform a duty, they will be jointly and severally liable for omitting to perform, or having performed negligently. The law treats all torts as several as well as joint; and the injured party may, at his election, sue all the partners, or joint tort-feasors, or any one or more of them for the tort. The rule is not confined to partnerships, but extends to all cases of joint torts, at the common law, whether positive or constructive. *Wis. Cen. R. R. Co. v. Ross*, 142 Ill. 9.

In a case of several tort-feasors the party injured may, at his election, sue one, or several, or all; when the suit is against one or some of them, but not against all, the person or persons sued have no right to complain. *City of Chicago v. Babcock*, 143 Ill. 359. See also *Fisher v. Cook*, 125 Ill. 280; *Winslow v. Newlan*, 45 Ill. 145; *W. St. L. & P. R. R. Co. v. Schacklet, Adm'x*, 105 Ill. 364.

MR. JUSTICE HORTON delivered the opinion of the court.

A rehearing was granted in this cause. Although we have arrived at the same conclusion as upon the original hearing, this opinion is filed in lieu of the statement and opinion heretofore filed in said cause, which are withdrawn.

This is an appeal from the Superior Court prosecuted to reverse a judgment against appellants in favor of appellee for \$6,250 and costs in an action of trespass on the case for personal injuries.

September 6, 1895, appellee, a little boy then about six years old, in company with another boy, was playing with a toy wagon on George street, Chicago. While so playing appellee was run over by a team of horses hitched to a wagon belonging to the appellant Brewing Company. The appellant Loseniecki was alone upon the wagon and was driving the team. The appellee was very seriously injured and no question is now considered as to the amount of the verdict.

It is contended on behalf of appellants that under the

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pleadings, record and testimony in this case a joint judgment against the appellants can not be sustained.

This position is most strenuously contested on behalf of appellee. And it is also contended on behalf of appellee that this question was not raised in the trial court and that, therefore, it can not be considered by this court.

The declaration contains two counts. In the commencement both the appellants are named as defendants. Aside from the proper averments that appellee was injured while exercising due care and caution, etc., it is averred in the first count that the Brewing Company "was then and there possessed of a certain wagon drawn by horses, which wagon and horses were then and there under the care, management and direction of a certain servant" of the Brewing Company, "namely, Frank Loseniecki, who was then and there driving the same," and that the Brewing Company, "then and there by its said servant, the said defendant Frank Loseniecki, so carelessly and improperly drove and managed the said horses and wagon that by and through the negligence and improper conduct of defendants in that behalf" appellee was run over and greatly injured.

In the second count it is averred that the Brewing Company was possessed of the wagon and horses which "were then and there under the care, management and direction of a certain servant of the defendant, who was then and there driving the same along and upon said George street," and the "defendant then and there, by its said servant, so carelessly and improperly drove, managed and directed the said horses and wagon, that by and through the negligence and improper conduct of said defendant, by its said servant in that behalf," appellee was run over and injured.

There is no averment or claim that there was any person present representing the Brewing Company, or that the Brewing Company is in any manner at fault or liable for the injury to appellee, otherwise than by reason of the conduct of Loseniecki as its servant. Therefore, if the appellant company is liable in this case, it is upon the doctrine of *respondet superior*.

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We shall first consider whether the question of joint liability is now properly before this court for determination.

Appellants moved in arrest of judgment. If a declaration be defective, it is in some cases cured by verdict. If the defect be such that it is cured by verdict, then it will not be preserved by motion in arrest.

The attorney for appellee, in discussing this question, cites *Callaway v. Walters*, 63 Ill. App. 570-71. He quotes, or purports to, the conclusion in that case upon this point, which is as follows, viz.:

"The objection, the appellants are not jointly liable, was not made in the trial court, and can not be first raised here. The judgment being against Callaway as receiver, and against Kemp as an individual, and awarding general execution against both, is an anomaly. But a misjoinder, and the consequence thereto, if the plaintiff should succeed, was not suggested in the lower court by demurrer or plea in the motion for a new trial, *or by motion in arrest*, or otherwise, and the irregularity of the judgment is not specifically assigned for error in this court."

In the case at bar there were motions in arrest, and there is an assignment of error in this court, based upon the overruling of the motions which were made by each of the appellants severally.

In making this quotation, the attorney for appellee, in his petition for rehearing, omits the words "or by motion in arrest" which appear above in italics. Although important, this may have been an accidental omission.

"If several persons are sued, and in point of law the tort could not be joint, they *may* demur, or *move in arrest of judgment after verdict*." *Yeazel v. Alexander*, 58 Ill. 254, 261.

The rule is that a verdict will never assist a statement of a defective cause of action. *Barnes v. Brookman*, 107 Ill. 317, 322; *W. C. St. R. R. Co. v. John Mark*, 82 Ill. App. 185.

"Where a declaration does not state a complete cause of action, the defect may be taken advantage of after verdict by motion in arrest of judgment. * * * After verdict, on a motion in arrest of judgment, the court will intend

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that every material fact alleged in the declaration, or fairly inferable from what is alleged, was proved on the trial (*Addington v. Allen*, 11 Wend. 375). After verdict, judgment will not be arrested for any defect in the declaration which, by reasonable intendment, must be considered to have been proved." *Cribben v. Callaghan*, 156 Ill. 552.

For the purpose of this question, it is assumed that every allegation in the declaration and all that may be fairly inferred from what is alleged, was proved at the trial. Still a complete cause of action is not established thereby if appellants are not jointly liable for the injury complained of. We are of opinion that the question of the joint liability of appellants is properly before us for consideration. *City of Peoria v. Simpson*, 110 Ill. 294, 300.

The question then recurs, are appellants jointly liable for the damages resulting from the injury complained of?

Upon this question there is a sharp conflict between the decisions of courts in different States, and between the Federal courts and the courts in some of the States.

Owing to the importance of this question in practice, and the fact that we can not concur in an opinion by the Appellate Court of this district, we feel constrained to review the authorities somewhat at length.

In *Parsons v. Winchell*, 5 Cush. 592, it was held that a master is not jointly liable with a servant for an injury occasioned by the negligence of the servant. This case, decided in 1850, seems to be a leading case upon this question, and is very frequently cited.

In that case, like the case at bar, one of the defendants was driving a pair of horses belonging to the other defendants. By reason of the negligence of the driver the plaintiff was injured. Suit was brought by the injured party against the owners and the driver of the horses jointly.

The court says:

"To maintain an action against two or more jointly, the plaintiff must show a joint cause of action. * * * It is said in *Hammond on Parties*, 77, that where a sheriff's bailiff, or a careless servant, is liable for causing a breach of duty, he can not be charged jointly with his superior, since the grounds of their liability are different."

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In an opinion by Mr. Chief Justice Gray, now one of the justices of the Supreme Court of the United States, rendered in October, 1878, the Parsons case was approved. *Mulchey v. Methodist Religious Soc.*, 125 Mass. 489-90.

The court, Gray, Ch. J., said:

"But the jury should have been instructed, as requested by the defendants, that this action, being in the nature of an action on the case, could not be sustained against both the society and its agents. If there was any negligence in the agents, Barber and Sleeper, for which they could be held liable, their principal, the society, would be responsible, not as if the negligence had been its own, but because the law made it answerable for the acts of its agents. Such negligence would be neither in fact nor in legal intentment the joint act of the principal and of the agents, and therefore both could not be jointly sued. It is not like the case of a willful injury done by an agent by the command or authority of his principal, in which both are in law principal trespassers, and, therefore, liable jointly. *Parsons v. Winchell*, 5 Cush. 592; *Hewett v. Swift*, 3 Allen, 420; *Holmes v. Wakefield*, 12 Allen, 580."

In *Page v. Parker*, 40 N. H. 47, it was held that an action on the case for a tort, in the nature of a conspiracy, could not be maintained jointly against a principal and his agent for the unauthorized fraudulent acts and representations of the agent done in the former's absence. The court said (p. 68):

In an action *ex delicto*, the act complained of must be the joint act of all the defendants, either in fact or in legal intentment and effect. But the act of a servant or agent is not the act of the master or principal, even in legal intentment or effect, unless the master or principal previously directs or subsequently adopts and ratifies it. *Parsons v. Winchell*, 5 Cush. 593."

The following cases sustain the principle that master and servant are not jointly liable for injuries arising only by reason of the negligence of the servant. *Campbell v. Portland Sugar Co.*, 62 Me. 552, 566; *Sellick v. Hall*, 47 Conn. 260, 273-4; *Clark v. Fry*, 8 Ohio St. 358, 377-8.

In *Warwax v. Cin., N. O. & T. P. Ry. Co.*, 72 Fed. Rep. 637, Judge Taft reviews a large number of cases, including

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those hereinafter referred to and cited by appellee in this court. That was a case brought by a party injured by reason of the negligence of an engineer, against the railroad company and the engineer jointly. The following statement in the syllabus is fully sustained by the opinion, viz.:

“When a master is made liable for the negligent or wrongful act of his servant solely upon the ground of the relationship between them, under the doctrine of *respondeat superior*, and not by reason of any personal share in the negligent or wrongful act, by his presence or express direction, he is liable severally only, and not jointly with the servant.”

On page 643 the court says:

“It will thus be seen that the master is not held on any theory that he personally interferes to cause the injury. It is simply on the ground of public policy, which requires that he shall be held responsible for the acts of those whom he employs, done in and about his business, even though such acts are directly in conflict with his orders which he has given them on the subject. The liability of the servant, on the other hand, arises wholly because of his personal act in doing the wrong. It does not grow out of the relation of master and servant, and does not exist at all, unless it would also exist for the same act when committed, not as the servant but as the principal. Liabilities created on two such wholly different grounds can not and ought not to be joint.”

And again, on p. 647, is this statement by the court:

“On principle we have no hesitation in taking the view so logically upheld by the Massachusetts courts, and in deciding that a suit against a principal and the agent, for the mere negligence of the servant, in the absence of the principal, is a misjoinder, and that the causes of action are not joint but several. * * * The engineer in this case was improperly joined as a defendant with the railway company.”

Gableman v. Peoria, D. & E. Ry. Co. et al., 82 Fed. Rep. 790 (Oct. 21, 1897), was a suit against a receiver operating a railroad, and one of his engineers jointly. It was to recover damages for injuries caused by the negligence of the engineer. The opinion by Baker, J., in the Circuit

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Court for the District of Indiana, fully sustains this statement in the syllabus, viz.:

“A cause of action growing out of the negligence of a servant while engaged in his master's business, is not a joint cause of action in tort against the master and servant.”

The same rule is stated in *Beuttel v. C., M. & St. P. Ry. Co.*, 26 Fed. Rep. 50, 54; *Cir. Ct., N. D. Iowa*, Nov. T., '85; *Hukill v. Ry. Co.*, 72 Fed. Rep. 745; *Cir. Ct. Dist. Ky.*, 1896; *Landers v. Felton*, 73 Fed. Rep. 311; *Hartshorn v. A., T. & S. F. Ry. Co.*, 77 Fed. Rep. 9; *Cir. Ct., W. D. Mo.*, Nov. 27, 1896; 1 *Chitty Pl.*, 16 Am. Ed., Sec. 91, note d., 1.

And now to the cases cited as holding the opposite rule.

In *Greenberg v. Whitcomb Lumber Co. and Parlan Semple*, 90 Wis. 225, the defendants were sued jointly. To the complaint the defendants each interposed a separate demurrer. Under the averments in the complaint both of the defendants were principals, and the case was in the Supreme Court only upon demurrers thereto. Some expressions in the opinion support the contention of appellant. But when the question which the court had before it is examined, it will appear that this case is hardly in point.

In *Martin v. L. & N. R. R. Co.*, 95 Ky. 612, it is held that a railroad company is liable for injuries caused by the negligence of one of its engineers. There is no discussion of the question in the opinion. The court merely announces its conclusion, and cites no authorities to support it. The only authority cited in the case upon this question is by the attorney for the plaintiff below, who cites *Shearman and Redfield on Negligence*, Sec. 244, in support of his statement that “Robinson, the negligent engineer, is jointly liable, and may be jointly sued.” The court seems to have acted upon this as being the law. The report of this case does not show that the engineer or the railroad company by which he was employed appeared or were represented. Turning to the section cited we find that it does not contain a word in support of the attorney's position as to joint liability. The title of the chapter is “Liability of Servants,” and the section referred to simply states that a servant is

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liable to a third person for a tortious negligence. There is not a word there as to joint liability.

The case of *Wright v. Wilcox*, 19 Wend. 343, is one in which a pair of horses attached to a wagon were being driven by a servant of the owner. The suit is against the owner and the servant jointly. In the court below a judgment was entered against both. That judgment was reversed by the (then) Supreme Court of Judicature, for the reason that the act of the servant was willful, and not merely negligent, holding that the principal is not liable for the willful acts of his servant.

Cowen, J., speaking for the court, said: "In a case of strict negligence by a servant while employed in the service of his master, I see no reason why an action will not lie against both jointly." This was, however, only *dicta*. The case was decided squarely upon the fact that the injury complained of was the result of willful trespass by the servant, and therefore not "a case of strict negligence."

In *Phelps v. Waite*, 30 N. Y. 78, the case in 19 Wend. is cited, and it is there held that the principal and agent are jointly liable for an injury resulting from the negligence of the agent. The opinion is very short, and the question is not discussed upon principle. Hogeboom, J., says in his opinion: "I have been unable, after a somewhat diligent examination, to find any reported case holding a different doctrine." That was fourteen years after the case of *Parsons v. Winchell*, *supra*, which has probably been cited more than any other case upon this question.

While the case of *Wright v. Compton*, 53 Ind. 337, may seem from the syllabus to sustain appellee's contention, yet in the case, as reported, it is difficult to determine whether, upon the question under consideration, it is in point. The plaintiff, while passing along a public highway, was injured by fragments of stone which were thrown upon him by blasting in an adjacent stone quarry. The suit was brought against four defendants. The complaint says that the defendant Wright "had employed and engaged at work" the other defendants to dig and remove stone, etc. Plaintiff

iff afterward dismissed his action as against two of the defendants. The remaining two defendants demurred to the complaint, "alleging as cause of demurrer the insufficiency of the facts averred to entitle the appellee (the plaintiff) to recover." The demurrers were overruled. Thereupon "an answer in three paragraphs was filed, the second and third of which were struck out on motion, leaving the sole issue of the case on the general denial." What the paragraphs were which were stricken out is not stated.

There is nothing further in the case from which to determine what the relation was between the two remaining defendants. It may be that the remaining defendant, Brackney, was liable as principal with the owner, Wright. It would seem that his responsibility was different from that of the two defendants who were dismissed out of the case, or the case would have been dismissed as to him also.

There is no discussion by the court as to what the relations were between the two defendants, or as to their joint liability, or upon what theory they were held to be jointly liable, and the facts established by the testimony do not appear. The court says, "That the servant is also liable for his own carelessness and negligence, and that the master and servant may be joined in the same action, are principles well settled." There is no argument or reasoning by the court upon this point, and no authority cited.

In *Johnson v. Magnusson*, 68 Ill. App. 448, it is held that the master and servant are jointly liable in a case like the one at bar. It is there stated that "the old law, correctly laid down in *Parsons v. Winchell*, 5 Cush. 592, is not now applicable." The reason assigned is that the distinction between trespass and trespass on the case has been abolished in this State. Rev. Stat., Ch. 110, Sec. 22.

This case definitely sustains the doctrine that master and servant are not jointly liable for injuries resulting from the negligence of the servant unless that rule is changed by the statute referred to. Is the rule thereby changed? That statute does not change the cause of action, nor increase or diminish or change the liability of a party. The rights of

parties are not thereby changed, but the form of action only. If these appellants may be held jointly liable in an action of trespass on the case, they may also be held to be jointly liable in trespass.

They can be held liable jointly only upon the theory that they are joint *tort-feasors* or joint wrongdoers. Joint *tort-feasors* means two or more persons who commit a tort. But the Brewing Company did not commit a tort. It is by law made liable (if it be liable) for the consequences of a tort committed by another. Two persons can not be held to be joint *tort-feasors* or joint wrongdoers unless they authorized, or directed, or were jointly engaged in the commission of the tort or the perpetration of the wrong. But this case does not seem to be in harmony with holdings of the Supreme Court of this State, or other cases in the Appellate Courts of the State.

In *Blalock v. Randall*, 76 Ill. 224, 228, it is held that the statute does away with the technical distinction between trespass and trespass on the case, but does not affect the substantial rights and liabilities of parties, so as to operate to give any other remedy for acts done than before existed. And it was there held that trespass would not lie for an act done under legal process, but that case only would lie. The same rule is restated in *Bassett v. Bratton*, 86 Ill. 155.

In *St. L. V. & T. H. R. R. Co. v. Town of Summit*, 3 Ill. App. 160, the same rule is applied in an action of trespass *quare clausum fregit*. The court there remarks that "The change goes only to the matter of the form of the action, and does not change substantial rights and liabilities." *Lowry v. Hatley*, 30 Ill. App. 298; *Wilmerton v. Sample*, 42 Ill. App. 257.

The case of *City of Peoria v. Simpson*, *ante*, 110 Ill. 294, is a case in which it was sought to hold the owner of certain premises and the city of Peoria jointly liable. The court, in discussing the question of joint liability (p. 301), states the rule to be as follows, viz.:

"Undoubtedly the rule is, for separate acts of trespass separately done, or for positive acts negligently done, although

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a single injury is inflicted, the parties can not be jointly held liable to the party injured. If there is no concert of action—no common intent—there is no joint liability.”

In the case at bar there is no concert of action—no common intent—by or on the part of appellants.

The Supreme Court, having thus stated the rule as to when there is no joint liability, then states the rule as to when there is joint liability, as follows, viz.:

“But a different principle applies where the injury is the result of a neglect to perform a common duty resting on two or more persons, although there may be no concert of action between them. In such cases the party injured may have his election to sue all the parties owing the common duty, or each separately, treating the liability as joint or separate.”

Appellants can not be brought within the latter rule. There was no common duty owing by them to appellee. If liable at all, then, as against the appellant Brewing Company, it is, by operation of law, upon the doctrine of *respondeat superior*, and as against the other appellant for his direct personal act. As to the former, it would be an action in trespass on the case, and as to the latter, an action of trespass.

A judgment can not be sustained against the master and servant jointly in a case where the master is liable only upon the doctrine of *respondeat superior*. The act of a servant is not the act of the master unless the act complained of is directed or adopted by the master. The master is not liable as if he had done the act himself, but because it is the policy of the law to protect the public by making him liable for the negligent acts of his servant, while the servant is acting within the scope of his employment. It is believed that this has been most generally held to be the law since it was so clearly stated by Lord Kenyon, C. J., in *McManus v. Crickett*, 1 East, 106.

Under the declaration and facts in this case, the question as to joint liability was properly preserved by motion in arrest of judgment, and is before this court upon proper assignment of error. Appellants are not jointly liable to appellee for the injury complained of.

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The judgment of the trial court must be reversed and the cause remanded. Appellee should be permitted to amend his declaration or to dismiss his suit as to either one of appellants, as he may elect. Reversed and remanded.

MR. JUSTICE SHEPARD: I think I will adhere to Johnson v. Magnusson, 68 Ill. App. 448, supported as it is, by some of the authorities referred to in the foregoing opinion.

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1. **ORDINARY CARE**—*Contributing to an Injury*.—When the plaintiff was guilty of a want of ordinary care which contributed to the injury, he can not recover, and whether he was so is a question of fact; but if the evidence of his negligence contributing to the injury is clear and indisputable, the court may direct the jury to find for the defendant.

2. **SAME**—*When the Court will Direct a Verdict for the Defendant*.—When the evidence given at the trial, with all the inferences that can be justifiably drawn from it, is so insufficient to support a verdict for the plaintiff that such a verdict, if returned, must be set aside, the court may direct a verdict for the defendant.

Action in Case, for personal injuries. Trial in the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Verdict for defendant by direction of the court; error by plaintiff. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed May 2, 1899.

JOHN F. WATERS, attorney for plaintiff in error.

WILLIAM J. HYNES and PLINY B. SMITH, attorneys for defendant in error.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

This is an action in which plaintiff in error seeks to recover damages for personal injuries. The court instructed the jury that the verdict must be for the defendant, and

gave judgment accordingly. The plaintiff brings the case here upon a writ of error. It is said that it must be remanded for a new trial, because "the evidence of the plaintiff himself shows that he exercised ordinary care, and as to whether he did or not, the jury and not the judge must decide.

The accident occurred after dark, upon the evening of September 24th. The evidence, as it is stated by plaintiff's counsel, is to the effect that one of the defendant's south-bound trains had stopped upon the westward of the two tracks on State street, Chicago, about two hundred feet south of Twenty-fifth street, to let off passengers. Plaintiff walked east across State street, immediately behind this train, and noticed two other south-bound trains standing north of, and the nearest about fifty feet in the rear of, the train behind which he sought to pass. "Owing to the darkness," says his counsel, "and the south-bound train behind which plaintiff passed, he did not see a train coming from the south at the rate of eight or nine miles an hour, on the north-bound track, until it was too late to escape it."

If the plaintiff was guilty of a want of ordinary care, which contributed to the injury, then he can not recover. *L. S. & M. S. Ry. Co. v. Hessions*, 150 Ill. 546; *Chicago City Ry. Co. v. Canevin*, 72 Ill. App. 81.

Whether he was thus negligent or not is a question of fact; but if the evidence of negligence contributing to the injury is clear and indisputable, then the court is justified in directing the jury to find a verdict for the defendant. *Ames v. Strachurski*, 145 Ill. 192.

When the conduct of the party whose duty it is to use due care is so clearly and palpably negligent that all reasonable minds would so pronounce it without hesitation or dissent, the court may so instruct the jury. *Hoehn v. C., P. & St. L. Ry. Co.*, 152 Ill. 223.

And when the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is so insufficient to support a verdict for the plaintiff that such a verdict, if returned, must be set aside, the court may direct

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a verdict for the defendant. *Simmons v. Chicago & T. R. R. Co.*, 110 Ill. 340.

The plaintiff was in the act of crossing the street from the west toward the east side. He was not at a street crossing, but more nearly in the middle of the block. His testimony is that he looked north before going upon the tracks, but he did not then look south in the direction from which the train was approaching by which he was struck. He says: "I looked north and when I came to the east rail of the west track I looked south. I could see nothing, and then I took another step in the track that took me to the slot. The car was so close to me it was ready to strike me. Then I took another step northward. At that time the car struck me."

It thus appears that the plaintiff left the sidewalk, and without looking in the direction from which he was aware that the cable trains would be likely to be approaching, passed behind a car which had just stopped and stepped immediately in front of the train by which he was struck. He did this without looking in that direction, either before his view was obstructed by the car behind which he passed, or after he had gotten to the space between the east and west tracks, where, had he taken this obvious precaution, he might still have avoided the injury. He did not look at all at the places where he could expect to see the approaching train, and he was not at or near a street crossing. The evidence shows no obstruction which could have prevented him seeing the approaching train and its headlight, which was burning as usual, had he chosen to look. While there is no fixed rule of law applicable to all cases, yet the question of negligence in failing to look or listen may become a question of law, and come within the province of the court, and a verdict may be directed if the evidence in the case is such that all reasonable men would be agreed in their conclusion from it. *C. & N. W. Ry. Co. v. Hansen*, 166 Ill. 623.

The learned judge who tried the case below appears to have been forced to the conclusion that this case came within the rule, and we think his conclusion correct.

It is said that the bill of exceptions, while containing the usual clause to the effect that it contains all the evidence, show, nevertheless, that portions of the evidence are omitted. An inspection shows this to be the case. Such a bill of exceptions has been held to be substantially defective (see *Lyon v. Davis*, 111 Ind. 384), notwithstanding it purports to contain all the evidence. In such case it can not be said that the trial court was not warranted by the evidence in directing a verdict for the defendant.

The ruling of the court in denying the motion for a new trial is not assigned as error, and its propriety need not, therefore, be considered.

For the reasons indicated the judgment of the Circuit Court must be affirmed.

Henry Dewitz, Ex'r of Caroline Shoeneman, v. Eleanore Shoeneman.

1. **TROVER**—*When it Does Not Lie*.—Trover will not lie for fixtures so long as they are annexed to the building.

Trover, for fixtures, etc. Trial in the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Finding and judgment for defendant; appeal by plaintiff. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed May 2, 1899.

JOHN W. BYAM, attorney for appellant.

STEIN & PLATT, attorneys for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

This suit is in trover. On behalf of appellee it is contended that trover will not lie for the property in question under the facts in this case. The facts, so far as they are necessary to an understanding of the question thus presented, are as follows, viz.: September 30, 1893, and prior thereto, Caroline Shoeneman, the testatrix of appellant, and Eleanore

Dewitz v. Shoeneman.

Shoeneman, the appellee, were owners of certain real estate in the city of Chicago, each being the owner of an undivided one-half thereof. At that date the tenant of said parties, who was in possession of said real estate, made an assignment of the lease thereof to said Caroline, and the same day gave to her a bill of sale of the machinery and fixtures in question. Such machinery and fixtures had been purchased and put upon the premises by said tenant while in possession of said premises. November 4, 1893, said Caroline (her husband joining) conveyed her undivided one-half of said real estate to the appellee, and at the same time assigned said lease to the appellee and delivered therewith possession of said premises, together with said machinery and fixtures. August 25, 1896, this suit was commenced. January 28, 1898, it was tried before the court, a jury having been waived, and a finding entered in favor of appellee (defendant below) and judgment against appellant for costs. It is to reverse that finding and judgment that appellant prosecutes this appeal.

Said machinery and fixtures, consisting of stationary steam engine, boiler, shafting, pulleys, automatic sprinkler system, steam and water pipes, fittings and connections, were attached and affixed to the building upon said premises, which was known as 303 and 305 Dearborn street.

Trover will lie for goods and chattels only. 1 Chitty's Pl. *146.

The machinery and fixtures in question were attached to the building when possession thereof was delivered to appellee. They were so attached when this suit was commenced and up to the time of the trial. Trover will not lie for fixtures while still annexed to the building. *Leman v. Best*, 30 Ill. App. 326; *Donnelly v. Thieben*, 9 Ill. App. 500; *Darrah v. Baird*, 101 Pa. St. 265, 272.

It follows that the judgment of the Superior Court must be affirmed.

82	380
107	524

O. M. Brady v. Washington Insurance Co.

1. CLERKS OF COURTS—*Duty in Transferring Cases to the Short Cause Calendar.*—When a suit on the regular trial calendar is transferred to the short cause calendar it is the duty of the clerk on making such transfer, to strike the cause from the regular trial calendar.

2. ERROR CORAM NOBIS—*Default of the Clerk—Grounds for.*—Where the court in striking a cause from the trial docket is misled by the failure of the clerk to strike such cause off the regular trial calendar such failure of the clerk is a sufficient ground for a writ of error *coram nobis*.

Assumpsit.—Trial in the Superior Court of Cook County, on appeal from a justice of the peace; the Hon. JOSEPH E. GARY, Judge, presiding. Appeal from the justice dismissed; appeal to this court by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed April 17, 1899.

Statement of the Case.—This was an appeal by appellee to the trial court from a judgment rendered against it by a justice of the peace. The present appeal is from a judgment dismissing appellant's suit for want of prosecution at appellant's costs. It appears from the record before us, that the cause was placed on the regular trial calendar for September, 1895, in the branch of the trial court presided over by the Hon. Nathaniel C. Sears; that in October, 1895, it was, by proceedings in accordance with the statute, placed on the short cause calendar, but was not stricken off the regular trial calendar, and, February 10, 1896, on motion of appellant's attorney, it was stricken from the short cause calendar. April 30, 1896, the cause not having been stricken from the regular trial calendar, it was reached on a preliminary call of cases on that calendar, and appellee not appearing, its appeal, on motion of appellant's attorney, was dismissed for want of prosecution. Appellee did not, nor did its attorney, learn of the dismissal of its appeal until after the expiration of the April term of the court, and at the following May term it moved the court, on notice to appellant's attorney, to set aside and vacate the judgment dismissing the appeal, which motion the court

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allowed, and May 23, 1896, vacated the order dismissing the appeal, and set the cause for trial at the June term, 1896, of the court. June 24, 1896, when the cause was reached for trial, appellant failed to prosecute, and his suit was dismissed for want of prosecution. On a former appeal to this court, it not appearing from the record that appellant had any notice of the motion to vacate the order dismissing the appeal, or that there was any cause for setting it aside which would be good on a writ of error *coram nobis*, the court reversed and remanded the cause. In its opinion, the court say :

“The judgment of the June term, 1896, is reversed and the cause remanded, with direction to vacate the order of the May term, 1896, unless some cause be shown for setting aside the judgment of April, 1896, which would be sufficient on a writ of error *coram nobis*.”

The cause was redocketed in the trial court, on motion of appellant, and the court set aside the judgment against appellant rendered June 24, 1896, but overruled appellant's motion to vacate the order of May 23, 1896, reinstating the appeal, and ordered the cause to stand for trial. Appellant again failing to prosecute, his suit was dismissed at his costs for want of prosecution.

The appellee, in opposition to appellant's motion to vacate the order of May 23, 1896, read certain affidavits, one of which purports to show a good defense to the suit.

F. L. SALISBURY, attorney for appellant.

A. L. FLANINGHAM, attorney for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

The question to be decided is whether cause was shown for setting aside the judgment of April 30, 1896, which would be sufficient on a writ of error *coram nobis*. It appears from the foregoing statement of facts that the cause was first on the regular trial calendar; that subsequently it was placed on the short cause calendar; that afterward it was stricken from the latter calendar, and that up to April

30, 1896, when the appeal was dismissed, it had remained continuously on the regular trial calendar from the time when it was first placed on that calendar.

Section 14 of the practice act provides:

"The clerks of the courts shall keep a docket of all the causes pending in their respective courts in which shall be entered the names of the parties, the cause of action and the name of the plaintiff's attorney, and he shall furnish the judge and bar at each term with a copy of the same," etc.

Sec. 16 provides that all causes shall be tried or otherwise disposed of in the order they are placed on the docket, etc. The docket thus made up is the regular trial calendar. Section 1 of the short cause calendar act makes it the duty of the clerk of each court of record to prepare a trial calendar, in addition to the regular trial calendar, to be known as the short cause calendar, and to place suits on that calendar, upon proper notice and affidavit, as prescribed by the section.

Section 2 makes it the duty of each judge of a court of record to designate at least one day in each week for the trial of cases on the short cause calendar, and provides that suits once placed thereon shall remain thereon until disposed of in their order.

Section 5 is as follows:

"If a suit which is upon the regular trial calendar shall be placed on the short cause calendar it shall be stricken off the regular trial calendar, and shall not again be placed thereon except upon notice to the defendant, his agent or attorney." 3 S. & C.'s Stat., C. 110, par. 97-101.

It is manifest from these provisions that the duty of making up both the regular and short cause calendars is imposed on the clerk, and we are of opinion that it is intended by the statute that the clerk, when he places on the short cause calendar a suit which is on the regular trial calendar, shall, at the same time, strike it off the latter calendar. By the statute the application to place a cause on the short cause calendar is made solely to the clerk, the court has no duty to perform in the premises and has no means of knowledge of an application to place a cause on

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the short cause calendar, or even of its being on that calendar, until the calendar is placed before the court. It being the sole duty of the clerk to make up the calendars, and the statute being peremptory, that when a suit on the regular trial calendar is placed on the short cause calendar it shall be stricken off the former calendar, and the court having no knowledge of the transfer from the regular calendar to the short cause calendar at the time such transfer is made, and not being required by the statute to act in any way in respect to such transfer, we can not avoid the conclusion that it is the duty of the clerk on making such transfer to strike the cause from the regular trial calendar. Had the court known, April 30, 1896, when appellee's appeal was dismissed, that it had been taken from the regular calendar and put on the short cause calendar, and afterward stricken from the latter calendar, but that it had never been stricken from the regular trial calendar and restored thereto, as provided by section 5, quoted, *supra*, we think it clear that the order of April 30, 1896, would not have been made. In contemplation of law the cause not being regularly on the regular trial calendar did not then stand for trial. The court, in making that order, was misled by the failure of the clerk to strike the cause off the regular trial calendar when he placed it on the short cause calendar.

A default of the clerk is one of the recognized grounds for a writ of error *coram nobis*. Pickett's Heirs v. Legerwood, 7 Pet. 144; Watson v. Chadsey, Ill. App., Oct. T., 1898, Gen. No. 7,927, unreported.

In Tidd's Practice, Section 1137, the author says:

"So, upon a judgment in the King's Bench, if there be error in the process or through the default of the clerk, it may be reversed in the same court by writ of error *coram nobis*."

We find no reversible error in the record, and the judgment will be affirmed.

Judge SEARS took no part in the decision of this case.

Louis M. Stumer et al. v. Cora Wilson.

1. **APPELLATE COURT PRACTICE—Error Must be Shown by the Abstract.**—When error is claimed, it must be shown by the abstract or it will not be considered.

2. **CONTRACTS—Offer to Perform—When Not Necessary.**—Where an employe under a contract is wrongfully discharged, he is not afterward required to offer to work before he can recover for breach of the contract by reason of such wrongful discharge.

3. **PARTNERS—Joint Liability.**—Where parties are sued as partners and their joint liability is not denied by affidavit, under the statute (2 S. & C., Ch. 79, Sec. 64), the plaintiff need not prove such joint liability in the first instance.

Assumpsit, for wages. Trial in the Circuit Court of Cook County; the Hon. CHARLES A. BISHOP, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed April 17, 1899.

JOSEPH W. ERRANT, attorney for appellants.

P. W. SULLIVAN, attorney for appellee.

Where one or more defendants in an action *ex contractu* are not served, it is proper to take a judgment against those who are served. 3d Starr and Curtis' Ann. Stat., Practice Act, Chap. 110, Par. 10, Sec. 9; Fender v. Stiles, 31 Ill. 460; Pierson v. Hendrix, 88 Ill. 34; Coursen v. Hixon, 78 Ill. 339.

The writ of scire facias, contemplated in section 9 of the practice act, is a writ of summons and nothing more. Coursen v. Hixon, 78 Ill. 339.

When several joint debtors are sued and one or more of them shall not be served with process, the recovery of the judgment against the parties served shall be no bar to a recovery on the original cause of action against such as are not served. 3d Starr and Curtis' Ann. Stat., Practice Act, Chap. 110, Par. 12, Sec. 11.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

Appellee recovered a judgment against appellants, Stumer and Rosenthal, before a justice of the peace, from which

they appealed to the Circuit Court, where a trial before the court and a jury resulted in a judgment against them for \$127, from which they have taken this appeal.

It is claimed that the suit was instituted before the justice against appellants and one Louis Eckstein as partners, under the name of the Millinery World; that no service was had on Eckstein either before the justice or in the Circuit Court, and it was therefore error to take judgment against appellants. Whatever may be the merit of such a contention, it is sufficient to say, as is the fact, that the abstract fails to show that the suit was ever brought against Eckstein, or that he was jointly liable with appellants.

When error is claimed, it should be shown by the abstract or it will not be considered. *City of Chicago v. Fitzgerald*, 75 Ill. App. 177, and cases cited; *Harper v. Dixon*, 70 Id. 136.

Appellee's claim is based on her wrongful discharge by appellants, in violation of a verbal contract alleged to have been made between her and appellant Rosenthal, by which she was employed as trimmer to work for appellants in the millinery business from March 29 to June 26, 1897, at \$20 per week. There was no material conflict in the evidence except as to the duration of the contract and whether appellee was, under its terms, required to work nights. This conflict presented a question peculiarly for the jury, and we can not say the verdict is manifestly against the weight of the evidence.

Appellants contend that, admitting there was a contract, as appellee testified, still there was adequate cause for appellee's discharge, and she can not recover. Appellants say they discharged appellee because she refused to work nights, and offered evidence as to an alleged custom to that effect in the busy season of the millinery trade. If it be conceded there was such a custom, that would not conclude appellee. She testified that it was part of her contract she was not to work nights. Rosenthal says he told her she would be obliged to work nights. It was for the jury to say which was right.

The only instruction given, and that was on behalf of appellee, while basing her right of recovery on the wrongful discharge, would seem also to require that "she was ready, able, willing, and offered to work and perform her duties" pursuant to the contract. Appellants claim that the evidence fails to show that she expressed her willingness to work, or offered to work and complete the contract, and therefore, under the instruction, appellee could not recover.

The jury evidently disregarded the instruction of the court, and was right. The evidence shows that appellee was discharged, and appellants say rightfully so. Appellee says that when she was discharged Mr. Rosenthal said, "Hurry up and get out of here as quick as you can. If you do not, I will kick you out." It is true this language is denied, but that she was discharged is affirmed. That being so, appellee was not thereafter required, under the law, to offer to work before she could recover for the breach of her contract by reason of a wrongful discharge. *Chicago House Wrecking Co. v. Rice Co.*, 67 Ill. App. 686; *Mo. & Ill. Coal Co. v. Pomeroy*, 80 Ill. App. 144.

The further claim is made that there is no evidence that shows the liability of Stumer, and as the judgment is a unit, it can not stand.

The record shows that appellants were sued as partners, joint liability was not denied by affidavit, and under the statute (2 S. & C., Ch. 79, Sec. 64) appellee need not prove the joint liability, in the first instance, under such circumstances. There being no reversible error shown, the judgment is affirmed.

Edwin Stanley Masterson, by Next Friend, etc., v. William C. Furman.

1. APPELLATE COURT PRACTICE.—Questions as to excessive damages and erroneous instructions can not be raised for the first time in the Appellate Court.

2. BILL OF EXCEPTIONS—*Must be Under the Seal of the Trial Judge.*—It is essential that the bill of exceptions be sealed.

Masterson v. Furman.

Action in Case, for false imprisonment. Trial in the Circuit Court of Cook County: the Hon. JOHN GIBBONS, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed April 17, 1899.

C. A. SURINE, attorney for appellant.

MASTERSON & HAFT, attorneys for appellee.

The signature of the judge appears on the bill of exceptions, as follows:

“JOHN GIBBONS, Judge,”

and consequently not being under the seal of the judge signing, the same is not effective as a bill of exceptions, and should not be considered by this court as such. *Widows', etc., v. Powers*, 30 Ill. App. 82; *Harms v. McCormick*, 30 Ill. App. 125; *C. & N. W. R. Co. v. Benham*, 25 Ill. App. 248; *Cline v. Toledo Ry. Co.*, 41 Ill. App. 516; *C. & W. I. R. Co. v. DeMarko*, 51 Ill. App. 581; *City of Sterling v. Grove*, 56 Ill. App. 370.

MR. JUSTICE SEARS delivered the opinion of the court.

This is an action for false imprisonment. The appellee, who sued by next friend, was twelve years of age when the injury was done which is the basis of the suit. Upon trial the jury found the defendant, appellant, guilty, and assessed the plaintiff's, appellee's, damages at \$400. Judgment was rendered upon the verdict.

It is now urged by appellant, first, that the verdict is excessive in amount, and secondly, that the instructions are erroneous, in that they submitted questions of law to the determination of the jury.

If we were at liberty to dispose of the case upon a decision of these questions, the result would be the affirmance of the judgment. No question was raised as to the amount of the verdict in the court below upon motion for a new trial, the grounds of which were specified in writing; nor is the amount of the verdict called in question by the assignments of error here. Hence this question could not now be considered. Without needless recital of the instructions, we

may say that we do not regard them as subject to the objection made.

But there is another reason why this judgment must be affirmed. The bill of exceptions is not sealed by the judge who signed the same. That it is essential that the bill of exceptions be sealed, is settled. *Jones v. Sprague*, 2 Scam. 55; *Miller v. Jenkins*, 44 Ill. 443; *Widow v. Powers*, 30 Ill. App. 82; *Cline v. Toledo Ry. Co.*, 41 Ill. App. 516; *C. & W. I. Ry. Co. v. DeMarko*, 51 Ill. App. 581; *City v. Grove*, 56 Ill. App. 370.

Appellant, after notice of the defect, has taken no steps to remedy it. We could not, therefore, in any event dispose of the case upon questions as to the procedure and verdict, which could only be presented by a sufficient bill of exceptions.

There being no question raised as to error in the common law record, the judgment is affirmed.

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96	108
898	96

John B. Delbridge and William H. Barry v. Lake, H. P. & C. B. & L. Association.

1. **CORPORATIONS—*Knowledge of its Officers and Agents is the Knowledge of the Corporation.***—A corporation can only act by its legally authorized agents or officers, and the knowledge of any officer or agent in respect to a matter pertaining to, or connected with his official duty, is, in law, the knowledge of the corporation.

2. **EMPLOYER AND EMPLOYEE—*Duty of Employer Toward Sureties when the Employee Gives a Bond of Indemnity.***—When the employer of a clerk or other agent takes a bond of indemnity, or other instrument, guaranteeing the honesty and fidelity of such clerk or agent while in the service of the employer, he impliedly stipulates that he will not knowingly retain such clerk or agent in his service after a breach of the guaranty justifying his discharge, and that in the event he does so without the surety's consent, it is to be at his own risk.

3. **BUILDING AND LOAN ASSOCIATIONS—*Duties of the Secretary.***—Where the by-laws of a building and loan association require the secretary to turn over to the treasurer at the end of each month all moneys received by him during the month, he commits a breach of duty when he first fails to turn over such moneys, and he should at once be called

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upon to account. In such case the liability of the sureties will be limited to moneys received during the month.

Debt, on a secretary's bond. Trial in the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Judgment for plaintiff on referee's report; appeal by defendant. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed April 17, 1899.

ARTHUR B. WILSON and HORACE G. STONE, attorneys for appellant Delbridge.

DEFREES, BRACE & RITTER, attorneys for appellant Barry.

After March 1, 1894, the secretary not only acted as secretary but he acted as treasurer also. His bondsmen are not liable for what he did as treasurer. *People v. Pennock*, 60 N. Y. 421; *Am. Dist. T. Co. v. Lenning*, 139 Pa. St. 594; *LaFayette v. James*, 92 Ind. 240; *Syme v. Bunling*, 91 N. Car. 48; *U. S. v. Cheeseman*, 3 Saw. 424; *Com. v. Toms*, 45 Pa. St. 408; *U. S. v. Morgan*, 28 Fed. Rep. 48; *People v. Hilton*, 36 Fed. Rep. 172; *People v. Tompkins*, 74 Ill. 482; 24 Am. & Eng. Ency. of Law, 756, 881.

MASTERSON & HAFT, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment rendered in an action of debt by appellee against appellants for \$5,000 debt and \$1,907.44 damages. The suit was on a bond in the penalty of \$5,000. The bond was executed by W. F. McWhinney and appellants, December 30, 1893, and after reciting that McWhinney had been elected secretary of appellee for the term of one year, expiring on the fourth Tuesday of December, 1894, contains the following condition:

"The condition of this obligation is such that if the above bounden W. F. McWhinney, who has been elected secretary of said association for the term of one year, expiring on the fourth Tuesday of December, A. D. 1894, or until his successor is duly elected and qualified, shall well and truly perform the duties of said office and safely keep, account for, and turn over to his successor in office, all

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moneys, papers or other property which may come in his hands by virtue of his official position, then this obligation to be void, otherwise to remain in full force and virtue."

The breach assigned in the declaration is as follows :

"That said McWhinney, as secretary, in accordance with his duties as such and in the regular course of his business as secretary of said association, received large sums of money, to wit, \$2,000, from the stockholders of the association and other sources, and converted the same to his own use, and wrongfully paid out, in violation of his duties as secretary, other large sums of money, to wit, \$2,000, all of which was wrongfully paid out and converted to his own use and is the property of the plaintiff; that it was the duty of said secretary to receive said sums of money from the stockholders and other sources and to pay the same to the treasurer of the association immediately upon receipt of the same; that disregarding such duty, he converted the same to his own use and wrongfully paid the same to others than the treasurer of the association."

Appellants pleaded that McWhinney became secretary of appellee about the fourth Tuesday of December, 1893, his term to expire the fourth Tuesday of December, 1894, or when his successor should be elected and qualified; that prior to the fourth Tuesday of December, 1894, he departed this life; that until the time of his death he had well and truly performed the duties of his office, and safely kept the moneys, etc., of the plaintiff; that after his death and before the fourth Tuesday of December, 1894, the plaintiff elected his successor, and that said successor had never demanded of his, McWhinney's, heirs, executors or administrators that they turn over such moneys, etc., and that no effort had been made by the plaintiff, or McWhinney's successor in office, to obtain said money from said heirs, executors or administrators.

There are other pleas, not abstracted, which we deem it unnecessary to notice, as no question in relation to the pleadings is raised by counsel.

The cause, by agreement of the parties, was referred to William S. Hefferan, as referee. Evidence was heard before the referee, who reported, recommending that a

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judgment should be entered in favor of appellee for \$5,000 debt and \$1,608.52 damages. Objections to the report were filed with the referee and were by him overruled, and exceptions were filed to the report in the Circuit Court, which were there heard and overruled, and the report confirmed, and judgment was entered as recommended by the referee.

Appellee, by its attorney, introduced in evidence certain by-laws prescribing the duties of the secretary and treasurer of the association. The by-law with regard to the secretary provides :

“The secretary shall keep a full and accurate report of the business of all meetings of the association and the board of directors, and for that purpose shall attend all meetings thereof. He shall enter such minutes in a book of record to be kept for that purpose. He shall keep an accurate account between the association and each of its stockholders. He shall draw and sign all orders and attend to all publications. * * * He shall make a statement of the financial affairs of the association and the business of the preceding quarter to the board of directors at the last meeting of each quarter, and shall publish an annual statement to the association on the fourth Saturday of December of each year. * * * He shall perform such other duties as are prescribed by the charter and by-laws, or that usually pertain to his office, or may be required by the board of directors or the association.”

The by-law prescribing the duties of the treasurer is as follows:

“It shall be the duty of the treasurer to demand and receive from the secretary at least once each month all moneys paid into the association. He shall on or before the last day of each month deposit all moneys of the association received by him in such bank or banks as the board of directors shall from time to time designate. The treasurer shall pay out such moneys from time to time only upon the order of the board of directors or the association. Such order shall be drawn by the secretary and signed by the secretary and president, or (in the latter's absence) by the vice-president or president *pro tem*. The treasurer shall keep a correct account of all moneys received and disbursed by him. He shall, at the last meeting in December, March,

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June and September of each year, render a full and accurate statement in writing of all business of his office. He shall perform such other duties as are required of him by the by-laws or may be required of him by the board of directors or the association, or that usually pertain to his office."

It will be observed that there is nothing in the by-law prescribing the duties of the secretary which requires or even contemplates that he shall receive any money. So far as appears from the by-law, his sole financial duties are to keep an accurate account between the association and each of its stockholders, to draw and sign orders and to make a statement to the board of directors each quarter of the financial affairs of the association. It is true that he is required by the by-law to perform such other duties as usually appertain to the office of secretary, or may be required by the board of directors or the association. The association can only act by the board of directors or an agent appointed by the board. The directors can only speak by the record, which, so far as is applicable to the secretary, would be by a by-law, and it does not appear that any agent or officer was appointed with power to prescribe or direct the duties of the secretary. The question would remain whether it was a duty usually pertaining to the office of secretary of the association to receive money.

George C. Munch, a witness for appellee, was examined and answered as follows:

Q. "State what were the sources of income to the association?" A. "There was due from the shares held by the various members fifty cents per month per share."

Q. "You need not go into that?" A. "And interest and premiums."

Q. "And interest and premiums on loans?" A. "Interest and premiums on loans and stock."

Q. "What else?" A. "Insurance money, loans repaid and taxes that were paid by the association."

Augusta Gale, assistant secretary of appellee and a witness for appellee, was asked by appellee's attorney: "State whose duty it was to receive the money of the association?" Objected to and objection overruled and exception.

A. "Mr. McWhinney's duty." The same question, in substance, had been put to Munch, and objection to it was finally sustained.

We think the evidence was incompetent. It might, perhaps, have been competent to prove that to receive money due to the association was a duty which usually pertained to the office of secretary of the association, but it was not competent for the witness to state her opinion or conclusion as to what McWhinney's duties were. We would not regard this error as cause for reversal, however, as it is not relied on in appellant's argument.

The evidence shows that March 1, 1894, the secretary, McWhinney, settled in full with the treasurer and then owed the association nothing; also, that after that date the treasurer never made any demand on the secretary for money, although it was his duty by the by-law quoted *supra*, "to demand and receive from the secretary at least once in each month all moneys paid into the association." The evidence of the witness Munch, and other evidence in the record, shows that money due to the association was paid to the secretary every month. This must have been known to the board of directors and the treasurer. It is simply impossible that it was not known to the association and all its shareholders that fifty cents per share per month was payable to the association, as testified to by Munch. Yet no demand was made on the secretary by the treasurer, or any other officer of appellee, in any of the months of March, April, May, June, July or August.

It is alleged in the declaration that it was the duty of the secretary to receive moneys from the stockholders and other sources, and to pay the same, immediately upon receipt thereof, to the treasurer of the association. Inasmuch as it was made the duty of the treasurer to demand and receive from the secretary, at least once each month, all moneys paid into the association, it was certainly the corresponding duty of the secretary to pay such moneys to the treasurer at least once in each month. As a corporation can only act by its legally authorized agents, or officers, the

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knowledge of any officer in respect to a matter pertaining to or connected with his official duty, is, in law, the knowledge of the corporation. The appellee, therefore, knew what its treasurer knew, namely, that the secretary was not paying to the treasurer moneys due to appellee which had been received by him.

In *Estate of Rapp v. Phoenix Ins. Co.*, 113 Ill. 390, it appeared that by a contract between the insurance company and certain agents, for whom Rapp was surety, the agents were required to make a full settlement with the insurance company of each month's business at the end of each month. The agents failed to make a settlement for the month of January, and also for the next succeeding February. In a suit by the company against the sureties on Rapp's bond, it was held that there could only be a recovery for defalcations in January, the court saying: "When the employer of a clerk or other agent takes from another a bond of indemnity, or other instrument, guaranteeing the honesty and fidelity of such clerk or agent while in the service of the employer, the latter impliedly stipulates that he will not knowingly retain such clerk or agent in his service after a breach of the guaranty justifying his discharge, and that in the event he does so without the surety's consent, it is to be at the employer's own risk. This is not only fair dealing and common honesty, but it is a rule of law also." See also *Donnell Manfg. Co. v. Jones*, 49 Ill. App. 327.

In the present case the secretary committed a breach of duty when he first failed to turn over to the treasurer moneys received by him during the month. He should then have been called upon to account. The treasurer's book put in evidence shows the last money received by the treasurer from the secretary under date of March 15, 1894. The treasurer testified that the amount under that date was the last so received by him, but he testified on cross-examination that the entry of March 15th was not made for at least fifteen days after he received the money. He also testified that there was no record of any money paid to him between March 15, 1894, and the date of the secretary's death, August

22, 1894; that the last money so received by him was received in March, 1894. We can not tell from the record before us, whether the secretary received any money for the association in the month of March, 1894, except that paid to the treasurer; if he did, it was his duty to pay it over to the treasurer on the last of March or the first day of April at the latest, and in such case the liability of the sureties would be limited to moneys received by him during the month of March. If the secretary received no moneys for the association during March, 1894, except such as he paid to the treasurer, then the sureties would be liable for moneys received by him during the month of April, 1894, and their liability would be limited to that month. The conclusion would be the same if it should be held that the secretary was not in default because no demand was made. The liability in such case would not extend beyond the end of the month when the first demand should have been made. The bond executed by appellee is conditioned for the faithful performance by McWhinney of his duties as secretary, not for the performance of the duties of a treasurer. From some time in the month of March, 1894, until August 22, 1894, he was permitted by appellee to occupy substantially the position and perform the financial duties of treasurer. The evidence shows that he and persons in his office, during that time, at least five months, received all moneys payable to the association and retained all the money so received except what was paid out to creditors of the association on orders. In view of the way in which the business was transacted, it is difficult to understand what use the association had for a treasurer. The evidence of the treasurer, John L. Snyder, shows that he neither attended to nor understood the duties of his office. He says:

“The secretary made three payments in March, two in February. When he quit paying in March, I made no inquiry as to why I was not receiving money from him, because it was not my business to make such inquiries; don't see why I should inquire; it was in no way appertaining to my business; it is my business to receive the money when it is turned over to me, not my business to go after it.

If the secretary had not paid me any money from one year's end to another, I would not have considered it my duty to demand it of him."

Assuming appellee's evidence to be true, the larger part of the money received by the secretary and included in the judgment was received not only after the month of March, but after the month of April, 1894.

In making up the account of McWhinney as secretary, a start was made March 1, 1894, the reason for which is assigned to be that the secretary's and treasurer's accounts then agreed. Munch, who made up the account, which was approved by the referee and by the court, testified that the secretary accounted to the treasurer for all funds received by the secretary up to March 1, 1894, and that March 1, 1894, there was \$743.72 in the hands of the treasurer; yet in the account stated by the referee, this amount (\$743.72) is charged to the secretary, and is continued as a charge against him down to August 22, 1894, the date of his death. If, March 1, 1894, the secretary had paid to the treasurer all moneys before that date received by him, it is manifest that, after March 1st, he could only be charged with the amounts received by him after that date, less proper disbursements made after that date.

The judgment will be reversed and the cause remanded.

C. C. Rowersock v. Cyrenius Beers.

1. **VENDOR AND PURCHASER—Want of Title in the Vendor.**—Where the vendor agreed to convey land upon the making of certain deferred payments, the fact that in the meantime, prior to the full payment of the purchase money he had no title, will not constitute a violation of the contract on his part; he has until the time he agreed to convey in which to acquire his title.

2. **SAME—Where the Tender of a Deed is Unnecessary.**—Where the purchaser of land under a contract declared "that he would not go through with the deed," the tender of a deed to him is unnecessary.

3. **DEMAND—In Replevin.**—A demand in replevin must be made before the commencement of the suit.

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4. *ESTOPPEL—To Complain of Instructions.*—Where an instruction is based upon a statement of the question in issue, and such statement is assented to by a party, such party will be estopped to complain that the instruction made the verdict to depend on the decision of that question.

5. *JUDGMENT—In Trover, Errors not Substantial.*—Where a suit in replevin is changed to trover it is error to state in the judgment that the plaintiff "do have and retain the property replevied by virtue of the writ of replevin issued in said cause," but such error is not substantial where the record shows that the property was not replevied.

Trover.—Trial in the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed May 8, 1899.

WALTHER & LANAGHEN, attorneys for appellant.

In an action of replevin or trover a demand for the property is necessary before bringing the suit, unless the original taking was tortious and wrongful. *North. Trans. Co. v. Sellick*, 52 Ill. 249; *Bertholf v. Quinlan*, 68 Ill. 298; *Alexander v. Rundle*, 75 Ill. 85; *Mulheisen v. Lane*, 82 Ill. 117.

GIDEON S. THOMPSON, attorney for appellee.

It was not material whether or not title was in vendors at date of contract; they had during lifetime of contract within which to acquire title. *Monson v. Stevens*, 56 Ill. 337.

Under the facts proven in this case it was the duty of purchaser to tender performance, and a failure to do this within the time specified in the contract justified a forfeiture of the earnest money. *Kimball v. Tooke et al.*, 70 Ill. 553; *Heckard v. Sayre*, 34 Ill. 142.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment of the Circuit Court, in trover, by appellee against appellant, rendered in that court on appeal from a justice of the peace. William J. Andrews and Charles Piper, partners in the business of dealing in real estate under the firm name of Andrews & Piper, contracted in writing with Reinhold Meyer, July 10, 1897, for the sale to Meyer of certain real property, a de-

scription of which is unnecessary to the decision of the case. The contract price of the premises was \$12,000. Meyer, on executing the contract, deposited with appellant his, Meyer's, check for \$200 as earnest money, agreed to pay \$1,300 within five days after the title should have been examined and found good, or accepted by him, and the balance in installments at times specified in the contract. The vendors on their part agreed to furnish a complete merchantable abstract of title, or merchantable copy thereof brought down to date of sale, within a reasonable time. Meyer further agreed to deliver to T. N. James within five days after the title had been examined and found good, or accepted by him, an assignment of a lease of the first floor of Nos. 1 and 3 North Clark street, together with a bill of sale of the stock, furniture and fixtures therein, and also to deliver possession of the same, providing good and sufficient warranty deeds of the premises sold to Meyer should be ready for delivery. The contract contains the following provisions:

"It is understood that the said Meyer pays rent for said premises numbered 1 and 3 North Clark street to the time when he gives possession thereof to the said T. N. James, and no longer.

It is understood that if the lessor of the premises numbered 1 and 3 North Clark street, shall refuse to consent to the assignment by the said Meyer of the lease of said premises, this contract shall be null and void and the \$200 earnest money refunded to the said Meyer. * * * Should said purchaser fail to perform this contract promptly on his part, at the time and in the manner herein specified, the earnest money paid as above shall, at the option of the vendor, be forfeited as liquidated damages, and this contract shall thereupon become and be null and void. Time is of the essence of this contract, and of all the conditions hereof.

* * * * *

This contract and the said earnest money shall be held by C. C. Rowersock for the mutual benefit of the parties concerned and after the consummation of the sale he shall be at liberty to retain the canceled contract permanently; and it shall be the duty of said C. C. Rowersock in case said earnest money be forfeited as herein provided, to apply the same, first, to the payment of any expenses incurred for

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the vendor in said matter, for his services in procuring this contract, rendering the overplus to the vendor."

Andrews & Piper, claiming that the earnest money had been forfeited, brought replevin for the check in the justice's court, but the return of the constable showing that the check had not been found, they proceeded in trover and recovered judgment for \$200 and costs. On appeal to the Circuit Court, Cyrenius Beers, who, in the meantime had been appointed receiver for Andrews & Piper, was substituted for them as plaintiff, and recovered judgment for \$200.

Appellant's counsel, in their brief, say:

"The errors we complain of may be stated as follows:

1. Lack of evidence to support the verdict.
2. The verdict is manifestly against the weight of the evidence.
3. Error in the instruction given.
4. The judgment as entered is erroneous."

Specifically they object as follows:

1. Title to only about one-third of the property sold was in the name of the firm.
2. The witnesses Andrews and James were erroneously permitted to testify that they delivered abstracts of title to the property.
3. The vendors did not tender a deed of the premises.
4. Meyer's landlord refused to consent to an assignment of the lease of numbers 1 and 3 North Clark street.
5. There was no evidence of a demand for the check before suit brought.
6. The instruction of the court to the jury was erroneous.
7. The judgment was erroneous.

If it was at all material to Meyer, the vendee, from whom the title should come to him, provided sufficient warranty deeds conveying the title should be executed to him, he is not in a position to complain, nor is appellant, who occupies the position of a mere stakeholder; because if, as assumed by counsel, a proper construction of the contract would require the conveyance to be made by Andrews & Piper, they had the right to acquire the title at any time before Meyer was ready to perform his part of the contract

(Mansen v. Stevens, 56 Ill. 335), and it is not pretended that he was ever ready to perform, and the evidence is conclusive that he was not.

The evidence shows that abstracts of title to the premises were delivered to Meyer, that he delivered them to his attorneys, and that after they were so delivered, he said that so far as he knew the title was all right, but that he had changed his mind and would not go through with the deal, would not do anything about it. Meyer, who would seem to be chiefly interested in defending the suit, was not called as a witness. It does not appear that any objection was made to the abstracts or to the titles shown by them. Under these circumstances, the tender of deeds was unnecessary. The evidence shows, however, that the vendors had in their hands deeds of the premises ready for delivery on the performance by Meyer of his part of the contract. In view of the admission of Meyer that he had received and delivered to his attorneys abstracts of title to the premises, the evidence of the witnesses Andrews and James, that the abstracts had been delivered, even if technically objectionable, could not prejudice appellant. Whether Meyer's landlord consented to the assignment of the lease of numbers 1 and 3 North Clark street, is a question of fact, and without discussing the evidence on that question in detail, suffice to say that we think the finding of the jury that he did consent, is fully warranted by the evidence. Andrews testified that a demand was made on Rowersock for the check, not stating the date of the demand. Appellant's counsel objects that the evidence is insufficient in not showing that the demand was made before suit brought. The witness was not cross-examined as to the date of the demand, no objection was made to his answer, nor in the written motion for a new trial, specifying reasons for the motion, is any reasons tated which includes the objection to the evidence of a demand. If no demand was made, or if a demand was not made until after the commencement of the suit, the fact might have been proved by appellant, but he was not called as a witness. Ernst was Meyer's landlord, and the court instructed the jury as follows:

"If the jury believe from the evidence that Ernst consented to an assignment of the lease, then the verdict will be for the plaintiff, but if the jury find from the evidence that Ernst would not consent to an assignment of the lease, the verdict must be for the defendant."

The instruction is objected to on the ground that it ignores material facts in the case. The following, which is not abstracted, appears in the record. In the examination of Ernst, Meyer's landlord, the clause in the contract quoted *supra*, providing that if Ernst should refuse to consent to the assignment of the lease, the contract should be void, was referred to by the court, the court saying: "Now show me that provision in the contract. That is virtually all that is in this case, isn't it?" To which Mr. Lanaghen, appellant's attorney, answered, "I think so." The court then read the clause in full, and said: "That is all there is in the case to go to the jury on, if Meyer refused to assign that lease, that ends the case." Mr. Lanaghen: "You mean Mr. Ernst." The court: "Mr. Ernst."

The appellant having, by his attorney, thus assented to the statement of the court that the only question of fact to go to the jury on was whether Ernst consented to the assignment of the lease, is estopped to complain that the instruction made the verdict to depend on the decision of that question.

The verdict of the jury and the judgment are as follows:

"We, the jury, find the defendant guilty and that the right to possession of the property in question is in the plaintiff, and assess the plaintiff's damages at the sum of two hundred (\$200) dollars."

"Therefore it is considered by the court that the plaintiff do have and retain the property replevied by virtue of the writ of replevin issued in said cause, and do have and recover of and from the defendant, C. C. Rowersock, his said damages of two hundred dollars in form as aforesaid by the jury assessed for the detention of the property herein, together with his costs and charges in this behalf as well as in the court below expended, and have execution therefor."

The judgment is informal in so far as it provides "that

the plaintiff do have and retain the property replevied," etc., and for this reason counsel object to it. The error is not substantial, and can not in the least prejudice the appellant, because the record shows that the property was not replevied, that the appellee has it not, and, consequently, can not retain it.

The judgment will be affirmed.

Stephen L. Bartlett v. Plows & Company et al.

1. INJUNCTIONS—*Assessment of Damages on Dissolution—Matter Foreign to an Appeal Not to be Considered.*—Matters wholly foreign to an appeal from an order or decree of the court assessing damages by reason of the issuance of an injunction can not be considered by this court.

Damages.—Injunction. Appeal from the order of the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1898. Affirmed. Opinion filed May 8, 1899.

MILFORD J. THOMPSON, attorney for appellant.

FLOWER, SMITH & MUSGRAVE, attorneys for appellees.

MR PRESIDING JUSTICE WINDES delivered the opinion of the court.

The only question presented in this case, which it is proper or necessary to consider, is whether the assessment of damages made by the chancellor on the dissolution of an injunction issued in the case, is correct. The appeal is from an order or decree of the court assessing damages by reason of the issuance of the injunction, and not from the decree dismissing the bill for want of equity, as seems to be assumed by appellant's counsel. The evidence, which was heard in open court by the chancellor, and which was competent and proper to be heard on the motion to assess damages, shows that the appellees, William Thompson,

Bartlett v. Plows & Co

William H. Hopkins and Edward S. Glickauf, copartners as William Thompson & Company, were defendants to appellant's bill and attaching creditors of Plows & Company, a corporation, also a defendant to the bill; that appellant, who was the complainant in the bill, obtained an injunction against the sheriff of Cook county, restraining him from selling certain property of Plows & Company, among other writs in his hands, under an attachment writ in favor of said appellees and against Plows & Company; that after a hearing on a motion to dissolve this injunction made by these appellees, it was dissolved by the court, and the bill of appellant dismissed for want of equity; that the services of the appellees' solicitors, in and about, procuring the dissolution of the injunction, were worth \$250; that this fee was the reasonable, usual and customary charge for such services; that appellees paid custodian's fees of the sheriff in keeping and protecting the property levied upon during the time the sale thereof was delayed by reason only of the issuance and continuance of the injunction, amounting to \$84, which fees were the reasonable, usual and customary charge for such services, and that appellees were damaged by such injunction the amount of said solicitor's and custodian's fees, which they paid.

Appellant's counsel makes an extended argument to the effect that because it appears that the appellee Hopkins was a director of Plows & Company, he could not, with his copartners, because of his trustee relation to the creditors of Plows & Company, sustain an attachment against Plows & Company, nor be benefited by the decree of the court assessing damages against appellant, also a creditor, and also, that the court erred in dismissing appellant's bill for divers reasons enumerated.

These matters, in our opinion, are wholly foreign to this appeal, and can not properly be considered by us. It is not claimed the damages assessed are excessive.

The decree of assessment of damages being fully sustained by the evidence, is affirmed.

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West Chicago St. R. R. Co. v. Louis Huhnke.

1. **JURORS**—*Illiteracy as a Disqualification May be Waived.*—A party litigant is entitled under the law to twelve jurors "well informed," but if his counsel fails to secure such a jury by not insisting upon his legal rights to question each juror as to his qualifications, his right to challenge on the ground of illiteracy is waived and he must abide the result.

2. **VERDICTS**—*Use of Affidavits to Impeach.*—As a general rule the affidavit of a juror can not be used for the purpose of impeaching his verdict or to question the manner by which he arrived at it, but the affidavits of his fellow-jurors may be used to show that he swore untruthfully on his *voir dire* and was therefore a prejudiced and disqualified juror. Affidavits of jurors may be used to show they never consented to the verdict.

3. **SAME**—*Prejudicial and Revengeful Jurors.*—The law does not leave litigants at the mercy of an unfair, prejudiced or revengeful juror, because such unfairness and prejudice may be concealed by perjury until the privacy of the jury room is reached, and, when for the first time it develops under the belief, that the jury's deliberations can not be revealed for any purpose.

Action in Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term 1898. Reversed and remanded. Opinion filed May 8, 1899.

Statement.—November 19, 1894, between 5 and 6 p. m., appellee, at the west crossing of Desplaines and Madison streets, Chicago, was run down by a grip car of appellant going west, to which was attached two trailers, had his leg run over and so injured that it had to be amputated. He brought suit, a trial of which before the Superior Court and a jury resulted in a verdict and judgment in his favor of \$10,000, from which this appeal was taken.

The evidence was conflicting, and if the verdict had been for appellant, we are not prepared to say it would not have been fully justified. Such being the case it was important that the verdict should be reached after a full and fair consideration of the conflicting evidence by twelve fair-minded, unbiased and unprejudiced jurors.

When the verdict was read it appeared that one of the jurors signed it by his mark and by his own affidavit, read on motion for new trial, it appears he could neither read nor write the English language and had to depend on one of the other jurors to read the court's instructions to him. It also appears on motion for new trial by affidavits of his fellow-jurors that A. E. Dunn, who was the foreman of the jury, stated during the deliberations of the jury on their verdict that he was prejudiced against appellant's attorney, and had it in for said attorney. The juror Dunn testified on his *voir dire*, among other things, in answer to questions by appellant's attorney, viz.: "I have no prejudice against any of the parties or counsel. I know of no reason myself that would make me unfair in the case."

ALEXANDER SULLIVAN, attorney for appellant; EDWARD J. McARDLE, of counsel.

CASE & HOGAN, attorneys for appellee; A. W. BROWNE, of counsel.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

Appellant claims, first, that it did not have a fair trial by an impartial jury; second, that a verdict should have been directed for appellant because of appellee's contributory negligence; third, that the verdict is against the law and the evidence and the weight of the evidence; fourth, that there was error in the court's rulings on instructions. First. That an illiterate juror was accepted on the panel, is no doubt the fault of the jury commission, court and counsel. Appellant was entitled, under the law, to twelve jurors "well informed," but if its counsel failed to secure such a jury by presuming that the jury commission had done its duty, and by failing to insist on his legal rights before the court, to question each juror as to his qualifications, appellant must abide the result. As to the prejudiced juror, a different question is presented. In answer to well

directed questions of counsel, the juror testified that he knew no reason that would make him unfair, and that he was not prejudiced "against any of the parties or counsel." His conduct in the jury room, which is not denied, shows these answers to have been untrue. It is true, as a general rule, that the affidavit of a juror can not be used for the purpose of impeaching the verdict, or in other words, "to question the manner by which he arrived at his verdict." (Smith v. Smith, 169 Ill. 623, and cases cited). But we see no good reason why the affidavits of one's fellow-juror may not be looked to to show that he swore untruthfully on his *voir dire*, and was therefore a prejudiced and disqualified juror. Affidavits of jurors may be used to show they never consented to the verdict. Smith v. Eames, 3 Scam. 80.

It can not be that our jurisprudence will leave litigants at the mercy of an unfair, prejudiced and even revengeful juror, because such unfairness and prejudice are concealed by perjury, until the privacy of the jury room is reached, when for the first time, it develops under the belief, no doubt, that the jury's deliberations can not be revealed for any purpose. For this reason alone, and especially in view of the evidence bearing on appellee's case, appellant should have been awarded a new trial.

2d. It is conceded that there was evidence to be submitted to the jury as to appellant's negligence, and we are of opinion, after careful consideration of the evidence bearing on appellee's contributory negligence, that it is such, when all the circumstances in evidence are considered; it can not be said, as matter of law, he did not exercise ordinary care for his own safety. He says that he looked in the direction from which appellant's train was approaching, and did not see it, and one of his witnesses says appellee looked in that direction. Even if he did not look, it has been held that would not *per se* be contributory negligence. C. & N. W. Ry. Co. v. Hansen, 166 Ill. 623-8, and cases cited; N. C. St. R. R. Co. v. Nelson, 79 Ill. App. 229; W. C. St. R. R. Co. v. McCallum, 169 Ill. 240-4; Pullman P. C. Co. v. Connell, 74 Ill. App. 447-52.

We therefore are of opinion the learned trial judge did not err in submitting the case to the jury.

3d. For the same reasons last above stated, the verdict is not against the law and the evidence, unless it be because it is against the clear weight of the evidence. As to whether the verdict is against the weight of the evidence, it is unnecessary for us to decide, as there must be a reversal for the reason stated.

4th. We have examined the instructions given, modified and given, and those refused, but find no reversible error in the court's rulings in this regard. It seems unnecessary to consider in detail the objections of counsel thereto.

The judgment is reversed and the cause remanded.

Chicago General Ry. Co. v. Chicago, B. & Q. R. R. Co. and the City of Chicago.

1. APPELLATE COURT—*Jurisdiction in Constitutional Questions.*—Where the construction of the State and Federal Constitutions is involved in a contention that an ordinance is void because it impairs the obligation of a contract between the complainant and the city of Chicago, in violation of the Constitution of the State of Illinois, the Appellate Court is without jurisdiction.

In Equity.—Bill for relief. Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Decree dismissing the bill. Heard in this court at the October term, 1898. Dismissed. Opinion filed May 8, 1899.

GLENN E. PLUMB, attorney for appellant.

C. S. THORNTON and S. A. LYNDE, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a decree sustaining a demurrer to a bill, filed by appellant against appellees, and dismissing the bill. The bill attacks an ordinance passed by the city council of the city of Chicago, January 24, 1898, upon the

ground that it impairs the obligation of certain alleged contracts between appellant and the State of Illinois, and between appellant and the city of Chicago, and is, therefore, in violation of Section 10, Art. 1, of the Constitution of the United States. Also, because said ordinance is in violation of Section 1 of Article 3 of said Constitution, and of Section 1 of the Fourteenth Amendment to said Constitution. One of the points made in appellant's argument, and which is seriously discussed, is: "The ordinance is void because it impairs the obligation of the contract between the complainant and the city of Chicago, in violation of the Constitution of the United States and of the Constitution of the State of Illinois." A construction of the State and Federal Constitutions being involved, we are without jurisdiction, therefore the appeal will be dismissed.

Eureka Elastic Paint Co. v. James Pease, Sheriff.

1. APPELLATE COURT PRACTICE—*What the Abstract Must Show.*—Whatever is relied upon as error should be shown in the abstract.

Replevin.—Motion to reinstate a case upon the docket in the Circuit Court of Cook County. Motion denied. Appeal. Heard in this court at the October term, 1898. Affirmed. Opinion filed May 8, 1899.

H. C. BENNETT and BUTLER, FLETCHER & MAINE, attorneys for appellant.

KNECHT & BULLARD, attorneys for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

This is a replevin suit, which was begun by writ returnable to the November term, 1897. On February 19, 1898, the court granted a motion to set the cause for trial, and it was placed at the foot of the trial call of March 10, 1898.

On March 29, 1898, it was reached and dismissed upon motion of appellee, the defendant below, for want of prose-

Eureka Elastic Paint Co. v. Pease.

cution. On April 9, 1898, appellant presented a motion to vacate the judgment of March 29th, and to reinstate the cause upon the docket. This motion was denied. The only error assigned is the calling of the cause for trial out of its order, or, in other words, advancing the cause improperly.

The abstract does not purport to show the proceedings had in relation to the advancing of the hearing, except to this extent, viz.:

“Motion by defendant to set cause for trial. Motion denied. Motion entered and continued, to be taken up on five days notice. Motion of December 8, 1897, called up February, 19, 1898. Motion granted and cause ordered to be set for trial at foot of trial call March 10, 1898.”

It is impossible to determine from the abstract as to whether the court advanced the hearing under the provisions of section 18 of the practice act, applicable to suits in replevin, or under section 17 of the same act, and upon good and sufficient cause shown.

If we go to the record itself for information, we learn from the bill of exceptions that the motion to set the cause down for hearing was entered at the November term, which was the return term, and continued. The reason for the setting of the cause later than the November term, when appellee was entitled, under the provisions of section 18, to have it heard, appears to have been a matter of convenience of the judge, due to some uncertainty as to the work which he would take up.

We think that the appellee, upon this state of facts, was entitled to a hearing at the earliest convenience of the court after the November term, when it was demanded as of right.

The denial of this motion of right at the November term ought not to operate to prevent its being granted as soon thereafter as was possible.

There was no error in the order setting the cause for hearing.

The judgment is affirmed.

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183 260**Charles A. Morrill v. Manhattan Life Ins. Co., Anna M. Murdoch and J. W. McCulloch.**

1. **INTERPLEADER—*Requisites of the Remedy.***—The equitable remedy of interpleader depends upon and requires the existence of the four following elements: First, the same thing, debt or duty, must be claimed by both or all the parties against whom the relief is sought. Second, all the adverse titles or claims must be dependent on or be derived from a common source. Third, the person asking the relief must not have, nor claim, any interest in the subject-matter. Fourth, he must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them, in the position of a mere stakeholder.

2. **SAME—*Office of Complainant.***—In an interpleader suit, the complainant's office is widely different from that of a complainant in an ordinary suit in equity, seeking to avoid a liability, or to enforce some right against the defendant. He comes into court with the money in his hand to discharge an acknowledged debt, which he is prevented, by conflicting claims, from paying to either of the claimants with safety to himself. His duty is at an end when he has brought the rival claimants to interplead by filing their answers and putting the suit at issue.

Bill of Interpleader.—Appeal from the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Decree and appeal. Heard in this court at the October term, 1898. Affirmed. Opinion filed May 8, 1899.

Statement of the Case.—September 29, 1897, the Manhattan Life Insurance Company, appellee, filed a bill of interpleader against appellant, Anna Murdoch and J. W. McCulloch, alleging, in substance, the issuing by it of two life insurance policies, each for the sum of \$2,500, on the life of James R. Murdoch, for the benefit of Anna M. Murdoch, his wife, her executors, administrators or assigns; the first policy numbered 63,523, and dated May 23, 1889, and the second numbered 65,949, and dated November 8, 1889; that May 30, 1897, James R. Murdoch died; that proper proofs of death were made and accepted by the complainant; that Charles A. Morrill claimed that at the time of James R. Murdoch's death, he held and still holds an assignment of the proceeds of said policies executed by Anna M. Murdoch, as required by complainant's rules, and

has instituted two suits on said policies in the Circuit Court of Cook County, one in the name of said Morrill, and the other in the name of Anna M. Murdoch, for his use, which suits are pending and have been noticed for trial on the short cause calendar; that July 2, 1897, appellees McCulloch and Murdoch made known and claimed, and still insist, that at the time of James R. Murdoch's death, they were entitled to the entire proceeds of said policies, the former by reason of an assignment to him of a portion thereof, and the latter as beneficiary therein, and that Morrill was not entitled to said proceeds; and that they would resist all claim of his thereto, and notified complainant not to pay the proceeds of said policies to said Morrill; and the said Murdoch and McCulloch are still claiming said fund, and are threatening to bring suit against complainant on said policies.

Complainant has now the sum of \$5,000, the proceeds of said policies, and has always been willing to pay said amount to the person lawfully entitled thereto, and offers to bring the same into court, as the court shall direct. Complainant denies all collusion; avers that the bill is exhibited of its own free will, to avoid vexation and harassment, and because it does not know to which of said claimants said money should be paid; prays that the defendants may answer, but not under oath, that they may interplead, etc., and that Morrill may be restrained from proceeding with said actions at law, and the other appellees from commencing actions at law, etc.

Annexed to the bill is the usual affidavit denying collusion.

December 24, 1897, appellees Murdoch and McCulloch filed their joint and several answer, admitting the issuance of the policies, the death of James R. Murdoch, the furnishing of satisfactory proofs of death, and that Morrill claimed to hold an assignment of the policies, and had caused suits to be instituted on them, as averred in the bill. The answer alleges that no valid assignment of said policies was made to Morrill, for the reason that when said Anna M. Murdoch signed and delivered the same to Morrill, James

R. Murdoch, her husband, was alive and not present, and did not consent to her acts in the premises; that James R. Murdoch, the husband of said Anna M. Murdoch, was for a long space of time in the employ of the defendant Charles A. Morrill; that during the course of said employment the said Murdoch, from time to time, became indebted to said Morrill; that at the close of the month of November, 1895, the said indebtedness was considerable; that on the 2d day of December, 1895, the said Morrill gave to the said Anna M. Murdoch a statement of his account against her husband, James R. Murdoch; that said account showed a balance of \$1,757.09 in favor of said Morrill, which amount he represented as the entire indebtedness of said James R. Murdoch to him at that time, and that said assignment was made to secure the indebtedness then due to Morrill, and any future indebtedness which she or her husband might incur to him; which said Morrill well knew, and that, December 2, 1895, he wrote to said Anna M. Murdoch the following letter:

"CHICAGO, ILL., Dec. 2, 1897.

MRS. J. R. MURDOCH, City.

DEAR MADAM: I this day received from you policies No. 63,523 in the Manhattan Life Insurance Company of New York for twenty-five hundred (\$2,500) dollars each on the life of J. R. Murdoch, in which you are named as beneficiary, being duly assigned to me. On payment by you or your husband of the balance due me, and also any further indebtedness that may be incurred by you or your husband from time to time, I will reassign these policies to you. I will also see that the premiums on these policies are paid when due and not allow them to lapse for non-payment during the time that I remain beneficiary, the amount, however, so paid to be charged to the account of J. R. Murdoch. I will also pay you fifty (\$50) dollars per month, payable weekly, during the time that J. R. Murdoch is in my employ; this amount also to be charged to his account. In case of these policies becoming payable from any cause whatsoever during the time that I am beneficiary, whatever amount may be due me from said J. R. Murdoch or yourself shall be deducted from the amount received on these policies and the balance paid over to you.

Yours very truly,

CHARLES A. MORRILL."

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The answer further alleges that defendants are not informed of the amount of indebtedness which Morrill claims, and reserve the right to dispute the same, if necessary; that Morrill, before the death of James R. Murdoch, became indebted to him in the sum of \$340.14, which is a set-off against any amount which may be found due to Morrill, and that, May 4, 1897, Anna M. Murdoch assigned to appellee McCulloch her interest in said policies by an assignment written on the reverse side of said letter from Morrill to said Anna M. Murdoch, which assignment is as follows:

“OWENSBORO, KY., May 4, 1897.

For value received, I hereby assign my interest in policies Nos. 63,523 and 65,949, Manhattan Life Insurance Co., \$2,500 each, mentioned on reverse side of this sheet, to J. W. McCulloch.

MRS. ANNA M. MURDOCH.”

Defendants claim the entire amount of \$5,000, due from said insurance company. December 27, 1897, Morrill answered, admitting, among other things, that at the time of the death of the insured, he claimed to hold and still holds assignments of the proceeds of said policies, executed as required by complainant's rules, by Anna M. Murdoch; that, December 3, 1895, each of said policies numbered, respectively, 63,523 and 65,949, were duly assigned, as required by complainant's rules, to defendant Morrill by Anna M. Murdoch, and said policies were by her delivered to said defendant, and have ever since remained, and now are in his possession, said assignments being the same in form, and one of them, with the acknowledgment thereof, being as follows:

“In consideration of one dollar and other valuable considerations, the receipt whereof is hereby acknowledged, I hereby sell and assign the annexed policy No. 63,523 on the life of James R. Murdoch, of Minneapolis, Minn., issued by the Manhattan Life Insurance Company of New York unto Charles A. Morrill of No. 21 Lake street, city of Chicago, county of Cook, State of Illinois, and I do also for myself, my executors and administrators, guarantee the validity and sufficiency of the foregoing assignment to the above named

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assignee, his executors, administrators and assigns, and their title to the said policy will forever warrant and defend.

Dated in Chicago this 3d, day of December, 1895.

ANNA M. MURDOCH."

"In presence of:

E. E. HOVEY."

"STATE OF ILLINOIS, }
City of Chicago, } ss.
County of Cook. }

On this third day of December, in the year of our Lord, 1895, before me personally came Anna M. Murdoch, to me known to be the individual described in, and who executed, the foregoing instrument, and acknowledged that she executed the same.

GEORGE H. SMITH,
Notary Public."

(NOTARIAL SEAL)

That December 4, 1895, said assignments were duly forwarded to said complainant, and, December 6, 1895, complainant acknowledged the receipt thereof, as follows:

"Your favor of the 4th inst., inclosing assignments of policies number 63,523 and 65,949, is received, and the same have been placed on file."

The answer further avers that complainant has never questioned the validity of, or made any objections to, said assignments, and that Anna M. Murdoch has, at all times, both before and since the filing of the bill, admitted their validity, and that they were made with the written consent of James R. Murdoch. Defendant admits that he has instituted suits on the policies, as alleged in the bill, and avers that the policies were assigned to him to secure indebtedness from James R. Murdoch to him, existing at the time of the assignments and advances, which might thereafter be made by him to said Murdoch, and that there is equitably due him on account of indebtedness due him from Murdoch at the date of the assignments and indebtedness since incurred by said James R. and Anna M. Murdoch, the sum of \$5,183.17. Avers that he is not informed, save by the bill, whether appellees McCulloch and Murdoch, July 2, 1897, claimed that they were entitled to the proceeds of the policies, and, therefore, denies the same and calls for strict proof. Denies that said appellees ever claimed that defend-

ant was not entitled to the proceeds of the policies, or notified complainant in writing not to pay the same to defendant. Denies that Anna M. Murdoch has any interest in the policies, superior to defendant's right, or any right to interfere with the payment to defendant of the full amount thereof. Denies that there was any valid assignment to McCulloch, and avers that if there was any assignment to him, it was without consideration. Denies that complainant has at all times been willing to pay to the person entitled, and avers that complainant has, at all times, known that defendant was the only person entitled to the proceeds of the policies, and that the claims of the other defendants were such that said proceeds could be paid to this defendant with perfect safety. Alleges that he has never refused to account to Anna M. Murdoch as to indebtedness incurred by the said Anna M. and James R. Murdoch, and has, at all times, been willing to pay to said Anna M. Murdoch, any sum which might remain, after payment to defendant of the indebtedness to him of said Anna M. and James R. Murdoch, etc.

October 18, 1897, before entry of appearance of the defendant to the bill, the court entered a temporary restraining order, restraining Morrill from the prosecution of the suits at law mentioned in the pleadings. February 7, 1898, the following decree was entered :

"This cause coming on to be heard this February 7, 1898, upon the bill of complaint, the joint and several answer of the defendants Anna M. Murdoch and J. W. McCulloch, and the separate answer of defendant Charles A. Morrill, and upon the face of the pleadings, after argument of counsel, it is

Ordered and adjudged that the bill of interpleader is properly brought by the complainant; that the complainant be paid the costs of this action, to be allowed from the funds in the bill mentioned, and that the complainant thereupon by consent of counsel retain the amount of the residue of said fund, said consent being without prejudice of the defendant or the defendant's right to appeal, as hereinafter prayed, for the benefit of such defendant or defendants as shall be found to be entitled thereto, and that the complain-

ant be dismissed from the further prosecution of this action, released, acquitted and discharged from all claims to either of the defendants by reason of said fund, except as hereinafter directed by the court, that the temporary restraining order restraining said Morrill from prosecuting the suits at law now pending in the Circuit Court of Cook County, be and the same is made a perpetual injunction.

It is further ordered and decreed that the said defendants do interplead, settle and adjust their separate claims and matters in controversy between themselves."

The appellant excepted to the decree and prayed an appeal, but it does not appear that any objection was made to a hearing on the pleadings.

CRATTY, JARVIS & CLEVELAND, attorneys for appellant.

PECKHAM & BROWN, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

Appellant's counsel claim that the bill of interpleader is insufficient. In *Platte Valley Bank v. Nat. Bank*, 155 Ill. 250, the court say:

"It is laid down in 3 Pomeroy's Equity Jurisprudence, Sec. 1322, that the equitable remedy of interpleader depends upon and requires the existence of the four following elements: 'First, the same thing, debt or duty, must be claimed by both or all the parties against whom the relief is demanded. Second, all the adverse titles or claims must be dependent on or be derived from a common source. Third, the person asking the relief, the plaintiff, must not have, nor claim, any interest in the subject-matter. Fourth, he must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them, in the position, merely, of stakeholder.'"

These elements co-exist in the bill in question. It is averred that the defendant Morrill claims the insurance money, and that Anna M. Murdoch and J. W. McCulloch also claim it; the titles of Morrill and McCulloch are both alleged to be claimed through Anna M. Murdoch, the beneficiary in the policies, and the ultimate, common source of all the titles claimed is shown by the bill to the insurance

company; the complainant disclaims all interest in the fund, and evidently has none beyond seeing that payment is made to the person or persons entitled to receive it; complainant has incurred no independent liability to any one of the claimants, and alleges perfect indifference as between them.

Counsel further contend that it was error to hear the cause on the bill and answers for the reason that the allegations of the bill that the defendants McCulloch and Murdoch made claim to the fund; that the complainant did not know to whom to pay it; and that it has always been willing to pay to the person entitled, are all denied by the answer of appellant Morrill, and therefore, required proof.

McCulloch and Anna M. Murdoch both claim the fund by their answer, but counsel for appellant insist that their answer could not be read as against appellant. The contrary doctrine was announced in *Balchen v. Crawford*, 1 Sanf. Ch. R. 380. In that case the court says: "The general rule is well established that the answer of one defendant can not be read in evidence against another defendant. There are, however, many exceptions to the rule." The court, after mentioning certain exceptions, proceeds as follows: "In an interpleader suit the complainant's office is widely different from that of a complainant in an ordinary suit in equity, seeking to avoid a liability, or to enforce some right against the defendant. Here the complainant comes into court with the money in his hand to discharge an acknowledged debt, which he is prevented, by conflicting claims, from paying to either of the claimants with safety to himself. His duty appears to be at an end when he has brought the rival claimants to interplead, by filing their answers and putting the suit at issue. It is true, he must show by his bill that each of the parties claims a right, else he makes out no case. But that is his whole case and when the court sees by the respective answers that such defendant has made such claim, I can perceive no well grounded reason for putting the complainant to other proof of that fact, against the opposing defendants respectively. That proof, if made by testimony, would consist almost

entirely of the declarations and admissions of the respective defendants," etc.

The objection made in the case cited was the same as made here. A defendant who did not by his answer admit that a co-defendant had made claim to the fund in dispute, insisted that proof that such claim was made was necessary.

We are of opinion that no proof was necessary of the allegations that the complainant did not know to whom to pay the insurance money, and that it had always been ready to pay it to the person entitled to receive it.

We do not agree with the contention of counsel that the written receipt by the insurance company of the assignments to Morrill operated as an acknowledgment of liability to him. We are of opinion that the facts alleged in the bill were sufficient to create a reasonable apprehension on the part of the complainant that it would be harassed by several suits in respect to the insurance money. We find no reversible error in the record, and the decree will be affirmed.

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f92 *186

Patrick J. Carey, Receiver of Atlas Loan Co., v. William Rauguth et al.

1. **PRESUMPTIONS—*In Favor of Sustaining Decrees.***—The Appellate Court will sustain a decree unless it is manifestly against the evidence, and especially so where the chancellor has heard all the witnesses whose testimony relates to the points in controversy.

2. **SAME—*From the Possession of Trust Deeds.***—Possession of a trust deed at the office, by the vice-president of a loan company and trustee named in the trust deed executed to secure a loan from the company, is sufficient to satisfy the grantor in paying it and taking a release from such vice-president and trustee.

3. **RECORD—*Right to Rely Upon.***—Where a trust deed to a loan company is payable at any time, at the option of the maker, a purchaser of the premises without notice has a right to rely upon the record of a release made before the maturity of the trust deed and after the appointment of a receiver for the company.

4. **ABSTRACT OF RECORD—*Right to Rely Upon.***—A person having an abstract of a real estate title is not bound to go to the records where they are not different from the abstract.

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Foreclosure of a Trust Deed.—Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge presiding. Decree for defendants.; appeal by complainant. Heard in this court at the October term, 1898. Affirmed. Opinion filed May 8, 1899.

Statement of the Case.—Appellant filed his bill seeking the foreclosure of a trust deed to Henry Blettner, made by William Rauguth and wife on certain real estate in Chicago, to secure his bond of \$10,000, dated March 9, 1894, conditioned for the payment of a loan of \$5,000, to him made by the Atlas Loan Company, a building and loan association organized under the laws of Illinois, and also asking that a release of the trust deed made by Blettner be declared fraudulent and void, and that the same be canceled.

Among other parties defendant to the bill were the appellees, Elizabeth S. Liversidge and Amos Liversidge, her husband, and Mason Young and Ambrose S. Murray, Jr., trustees of Mary E. Lewis.

Elizabeth S. Liversidge claims to have purchased said real estate in good faith, paying the full value thereof on October 1, 1894, and without notice of the alleged fraudulent nature of said release, and relying upon the record thereof in the public records of Cook county.

Said Young and Murray claim to have loaned to said Rauguth \$4,000, July 3, 1894, he making and delivering to them his note of that amount, and securing the same by a mortgage to them of said real estate; that they paid over the amount of said loan upon the faith that their said mortgage was the first and only lien on said real estate, and without any knowledge on their part that a receiver had then been appointed for said loan company, and in the full belief that the indebtedness mentioned in the bill had been fully paid and satisfied. Appellant was appointed receiver of the loan company April 18, 1894. A trial before the chancellor, the witnesses testifying in open court with the exception of Mason Young, whose deposition was read, resulted in a decree dismissing the bill for want of equity, from which this appeal is taken.

The trust deed sought to be foreclosed, as offered in evidence, had written across its face the words, "Paid April 10, 1894. Atlas Loan Company, by Peter Thiesges, Treas.," and the signatures thereto were canceled. The bond secured by the trust deed had the same indorsement across its face, and the signature thereto was canceled. As to when these indorsements were made, there is a conflict in the evidence. The indebtedness was not, however, paid as stated in the indorsements, and we think the preponderance of the evidence is that these indorsements were made prior to July 19, 1894. Appellant testified that after his appointment, the same or the day following, he went to the office of the loan company, where he met the secretary of the company, the said Rauguth, and the officers, and that Rauguth turned over to him, with other mortgages, this mortgage in question (meaning the trust deed), and the bond, and that he kept them in his possession from that time, except on the 18th day of July, 1894, when they were introduced in evidence before a master and left with him for a time thereafter, not definitely shown, and that Rauguth never got the papers from appellant. It also appears that appellant was appointed receiver at the instance of Rauguth, or an attorney, Martin, and that they were on friendly terms until after appellant heard that the release of the trust deed had been made; that Rauguth was secretary and assistant treasurer of the loan company, and did practically all its business, and that Peter Thiesges was only nominally treasurer. When appellees Young and Murray made the loan to Rauguth, their attorneys, Mason Brothers (who did all the business), as was their custom, first had Rauguth execute his note for \$4,000 July 3, 1894, and also a mortgage or trust deed to Young and Murray, trustees, securing the same, which was recorded July 9, 1894. Thereafter an abstract of the property was made, showing the title, including this trust deed, which they examined. Two incumbrances on the property were shown by the abstract, one of them being the trust deed to Blettner. One of these incumbrances, a trust deed to

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Wasmansdorff & Heinemann, was paid off by a check of Mason Bros. to Rauguth, which was indorsed and delivered to Wasmansdorff & Heinemann, and their trust deed released.

Rauguth stated to Mason Bros.' representative, who attended to the business, that there was only \$2,500 due on the trust deed to Blettner. A check of Mason Bros. for that amount was made to the order of Rauguth, and by him indorsed and delivered to Blettner, the vice-president of the loan company, at its office, on July 19, 1894, when, at the same time, Blettner delivered to the representative of Mason Bros. the trust deed now sought to be foreclosed, and the bond secured by it, and also a release of the trust deed, dated April 10, 1894. There is a conflict in the evidence as to whether the trust deed and bond thus delivered were the originals or copies thereof, substituted in place of the originals, and to deceive Mason Bros.' representative. We can not say that the evidence fails to show they were the originals. The release was recorded July 19, 1894, and a short time thereafter, at Rauguth's request, Mason Bros. gave the trust deed and bond handed to their representative by Blettner to Rauguth. The remainder of the \$4,000, after deducting the expenses of the loan and paying taxes, was paid over to Rauguth. The check delivered to Blettner was introduced in evidence, and has the indorsement of Blettner. At the time of this transaction with Blettner neither Mason Bros. nor their representative, nor the appellees, Young nor Murray, had any actual notice that a receiver had been appointed for the loan company, nor had either of them any actual notice that there was any other amount due on this bond than the \$2,500. The only one who professed to know anything of the amount due on this bond was Rauguth, and he testified that there was only \$2,500 due when the release was delivered. At that time the president of the Atlas Loan Company was absent from the office of the company, and the by-laws of the company provided that, among other duties of the president, he should sign releases of mortgages and

perform other duties pertaining to the office, and that in the absence of the president, the vice-president should perform such duties. The by-laws also provided that the secretary should receive money paid to the company. Neither Mason Bros. nor their representative, who did this business, knew at that time that Rauguth was the secretary and assisting and acting treasurer of the company.

At the time of the hearing Rauguth had purchased and was the owner of ninety-five per cent of the stock of the company. On or about October 1, 1894, the evidence shows that the appellee, Elizabeth S. Liversidge, purchased and paid full value for said real estate, except \$4,000, which she agreed to pay, and received a warranty deed of the same of that date from Rauguth and wife, subject to the mortgage to Young and Murray, which she assumed and agreed to pay. Before making the purchase she caused an abstract of title of the property to be examined by her attorney, which abstract showed the title in fee of the property to be in William Rauguth, subject only to the Young and Murray mortgage of \$4,000. Neither she nor her attorney had any knowledge or notice whatever, at the time of said purchase, of any fraud or invalidity of said release of the Blettner trust deed, nor of any claim of lien thereunder by appellant.

CORNELIUS S. SEE and J. W. COCHRAN, attorneys for appellant.

The true view of this indebtedness is that the return of the money at any period, intermediate between the time of taking it and the time of the ultimate squaring of accounts upon the expiration of the society, or series, is not contemplated by the contract. That money is never, before that period, intended to be collected or repaid. Endlich on Building Associations, Sec. 129.

By his bond and mortgage he obligated himself to continue these payments until the end of the society's existence. Ibid, Sec. 447.

An agent intrusted with and in possession of a negoti-

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able or other instrument, is deemed by the fact of such possession to be authorized to receive payment of the instrument in accordance with its terms, when and after it becomes due and not otherwise. *Lawther et al. v. Thornton*, 67 Ill. App. 214; citing *Thompson v. Elliott*, 73 Ill. 221, and other authorities.

The second mortgagee having notice that the prior mortgage had not matured was put upon inquiry. *Keohane v. Smith*, 97 Ill. 156.

HENRY B. MASON, attorney for appellees Mason Young and Ambrose S. Murray, Jr., trustees, Mary E. Lewis and Hortense C. Nelson, contended that the Young loan is the first and only lien because the lenders exercised due care to pay off the Atlas loan. Ill. Rev. Stat., Cap. 32, Corporations, sub-title Loan Associations, Sec. 78; *Thornton v. Lawther*, 169 Ill. 228; *Harris v. McIntyre*, 118 Ill. 275.

They were entitled to rely and did rely upon the release of the Atlas loan. *Bacon v. VanSchoonhoven*, 87 N. Y. 446.

They had no actual knowledge of the receivership.

They had no constructive notice of the receivership. *Miller v. Sherry*, 2 Wall. 237; *Low v. Pratt*, 53 Ill. 438; *Watson v. Gardner*, 119 Ill. 312.

WARVELLE & CLITHERO, attorneys for appellee Liversidge.

The rule is fundamental that one who purchases without notice of an equity is not affected by such equity; further, that a purchaser is not required to look for latent defects in the chain of conveyances when they purport to be made by the proper persons. *Moore v. Hunter*, 1 Gilm. 317; *Spicer v. Robinson*, 73 Ill. 519; *Dickerson v. Evans*, 84 Ill. 451.

It would be dangerous to purchase land if such was not the doctrine.

At the time of her purchase appellee Liversidge did all that a prudent person is required to do. She found appellant's trust deed upon the records; she also found a release of the same, regular in form and executed by the person

whom the law appoints to perform that act; she further found that the debt for which the trust deed was given was of indeterminate duration and might be discharged at any time. There was nothing to suggest fraud or irregularity, or to prompt further inquiry. She had a right to assume that the trust deed in question was properly released and no longer a lien. *Bacon v. Van Schoonhoven*, 87 N. Y. 446; *Allen v. Woodruff*, 96 Ill. 11; *Warder v. Cornell*, 105 Ill. 169; *Grundies v. Reid*, 107 Ill. 304.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

Appellant contends that the Blettner trust deed should have been declared a first lien, or that, second, he should be substituted to the Young and Murray mortgage to its full amount of \$4,000, or, third, to the amount of \$2,500.

It is not claimed that Mason Bros., or their representative, who did the business of making and closing the loan of \$4,000 to Rauguth, were, by the public records, charged with constructive notice of the appointment of the receiver for the loan company, and the evidence is clear that they had no actual notice of the receivership.

The only question, then, so far as concerns the Young and Murray mortgage, is, had their agent, who closed the loan and paid the \$2,500 to Blettner, knowledge of sufficient facts to charge them with the fact that, as to appellant, the Blettner trust deed was fraudulently released.

The statute regarding building and loan associations (Ch. 32, Sec. 87, Hurd) provides that "a borrower may repay a loan at any time," and makes a building association mortgage or trust deed due at the option of the maker—places it in the same position of an ordinary incumbrance, which has by its terms matured. The authorities cited in regard to the payment of incumbrances not matured are, therefore, not applicable. They knew that the records showed due upon the incumbrance \$5,000. Rauguth, who had made it, and of all persons should know, assured them there was only \$2,500 due on it; their representative went to the

office of the company, and there met the vice-president of the company with Rauguth, who assented to Rauguth's claim that only \$2,500 was due; the president of the company was absent, the bond and trust deed were in the hands of the vice-president; the representative objected that the release was dated April 10, 1894, instead of about the time of the transaction; this was explained by Rauguth, that the release was made out at that time because he had made an arrangement to pay the bond at that time, and this explanation was assented to by the vice-president. But it is said the evidence shows the original trust deed and bond were not produced, but copies. On this the evidence is conflicting, and we are not prepared to say that it is manifestly against the evidence to have found, as the chancellor must have done, in order to render the decree he did, that the originals were produced by the vice-president and surrendered to Mason Bros.' representative. We should sustain the decree unless it is manifestly against the evidence, and especially so where the chancellor has heard all the witnesses whose testimony relates to this point. *Miltimore v. Ferry*, 171 Ill. 219; *Delaney v. Delaney*, 175 Ill. 199; *Ragor v. Brenock*, 175 Ill. 494.

The possession of the bond and mortgage by Blettner, the vice-president of the company and the trustee, at the office of the loan company, was sufficient to justify its payment by Mason Bros.' representative and the taking of the release made by him. *Thornton v. Lawther*, 169 Ill. 228.

It is claimed that the fact the bond and trust deed were canceled and marked paid, and the release dated so near the making of the trust deed, was sufficient to put Mason Bros.' representative on inquiry as to the *bona fides* of the transaction. He did inquire of the very persons who, of all others, in the absence of the president of the company, could give him the information, and acted on the information they gave him. We are of opinion that he did all that a reasonably prudent business man would have done under the same circumstances, and that the decree of the chancellor was right in so far as concerns the Young and Murray mortgage.

That Elizabeth S. Liversidge is entitled to the full protection of an innocent purchaser for value, and without notice of appellant's claim, follows without controversy in view of the statement of facts above made. So far as concerns the Blettner trust deed, it being under the statute payable at any time at the option of the maker, she had a right to rely on the release which was shown by the abstract which her attorney examined. *Jummel v. Mann*, 80 Ill. App. 288, and cases there cited.

Had the attorney gone to the records to examine, he would have obtained no more information than was given him by the abstract. He was not bound to go to the records, they not being different from the abstract. We think the decree was right as to Mrs. Liversidge, and it is affirmed.

**William J. Strong v. International B., L. & I.
Union et al.**

1. *ATTORNEYS—Accepting Employment from Adverse Litigants.*—Attorneys can not accept employment from adverse litigants at the same time and in the same controversy. The rule is a rigid one, and designed, not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests rather than to enforce to their full extent the rights of the interest which he should alone represent.

2. *SAME—Acting in the Character of an Umpire.*—When an attorney at law acts with the consent of both adverse litigants, in the character of an umpire, for the determination of their differences, there is then no inconsistency in such employment. But where the employment for each is to protect the respective and conflicting interests, as they may arise in the litigation, it is generally held to be against public policy to allow a recovery of compensation.

Claim for Attorney's Services.—Heard on petition in the Superior Court of Cook County; petition dismissed; appeal by petitioner. Appeal heard in this court at the October term, 1898. Affirmed. Opinion filed May 8, 1899.

Strong v. International B., L. & I. Union.

Statement of the Case.—A bill was filed by one Emrick, alleging insolvency of appellee, a building and loan association, and a receiver for it was appointed. In that suit appellant filed a petition which alleged, in effect, that the appellee was indebted to him for professional services, and praying that his claim be allowed and that the receiver be ordered to pay the same. Appellee answered the petition, denying that appellant was entitled to any amount in that behalf. Upon hearing, the petition was dismissed for want of equity.

Appellant is a practicing attorney at law, and there is evidence to show that he rendered professional services to appellee as follows: In 1896, suits were begun both in the Circuit and Superior Courts of Cook County for the appointment of receivers of appellee, on the ground of its then insolvency. Receivers were appointed by each court, and a conflict ensued as to the priority of jurisdiction acquired. Upon January 1, 1897, the president of the association called a meeting of the directors, which was held upon that day in appellant's office. It was at this meeting that appellant was first employed by the directors of the association to take charge of its litigation then pending. Services were rendered by appellee in the various proceedings which followed up to August 14, 1897, at which latter date his services ceased. At that time the association had been freed from the litigation, its various receivers had been discharged, and it was again a going concern. Whether this result was accomplished through efforts of appellant is a controverted question.

The amount claimed by appellant is \$5,000, and there is evidence tending to show that the amount would be a proper compensation for the services claimed to have been rendered. The employment of appellant was for the purpose of accomplishing the discharge of all receivers and the restoration of the association to the management of its own officers. During the period of this employment, the exact time not shown by the abstract, appellant accepted retainer and employment by one of the contesting sets of receivers,

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viz., the receivers appointed by the Superior Court, and thereafter and during the period of his employment by the association, proceeded to render professional services as well to these receivers in the same litigation. For his services to the receivers he was paid \$1,295.

After the association had been freed from the litigation and the receivers had been discharged and a new board of directors elected, the validity of whose election is not questioned, a resolution was adopted by the board of directors at a meeting held on August 7, 1897, by which it was resolved "that we do hereby approve of all that our attorney, William J. Strong has done in behalf of the Union in the litigation that has been pending in the Circuit and Superior Courts in the case of McGonigle et al. against this Union," etc.

On November 17, 1898, another resolution was presented at a meeting of this board of directors, to the effect that "Strong had no authority to represent the Union," and "that all previous resolutions of this board regarding Strong's claim be rescinded." This resolution was defeated by a vote of seven to two. Again, on November 27, 1897, a resolution was adopted by this board of directors, which, in effect, recites that the sum of \$1,295 had been paid to appellant under a misapprehension, and instructing the attorney of the association to commence proceedings against appellant to recover the amount so paid.

There was evidence tending to show that appellant agreed with the association that unless he should succeed in getting the assets of the association restored to it, *i. e.*, unless he procured the discharge of the receivers, within sixty days from February 4, 1897, he would charge nothing for his services to the association. This is denied by appellant, who testified that he had agreed only to charge nothing to the members of the board of directors individually in the contingency named.

The receivers were not discharged, nor were the assets of the association returned to its management until after the expiration of the sixty days indicated.

From the decree of the Superior Court, dismissing appellant's petition, this appeal is prosecuted.

HENRY S. ROBBINS, attorney for appellant.

PAM, DONNELLY & GLENNON, attorneys for appellees.

MR. JUSTICE SEARS delivered the opinion of the court.

We do not deem it necessary to go into any discussion of the evidence either as to the regularity of the election of the various boards of directors prior to the last, or as to the fact of the employment of appellant by the association. We regard the resolution of the board of directors of August 7, 1897, as disposing of all such questions. The then board of directors was legally elected, and while question may be made as to the legality of the other conflicting boards, and hence as to the authority of the one or the other to employ counsel for the association, yet this last board of directors, as to the legality of which no question is raised, ratified the employment of appellant by the resolution of August 7, 1897. The resolution of November 17, 1897, which was defeated and not adopted, had no effect upon the prior ratification. Nor did the resolution which was adopted on November 27, 1897, for that resolution related only to the moneys paid to appellant from the funds of the association for his services to the receivers, and not at all to the claim for services rendered to the association. The same consideration disposes of the question raised by the conflict in the evidence as to whether appellant agreed to make no charge at all against the association for his services unless he accomplished certain results, which it is conceded were not accomplished. The resolution ratifying the employment and approving of the services rendered would, we think, operate to dispose of this question in favor of appellant.

But it appears from the evidence, and without any contradiction, that appellant, after having been retained by the association, accepted employment in the same litigation as counsel for others, who represented interests adverse to the

interests of the association, viz., the receivers; and that he performed services for the receivers during the period of his employment by the association, and while he was charging the association for services to it, and that he has been paid from the funds of the association for such services to the receivers. Appellant testified that "the Union (the association) was antagonistic to the receivership;" that he was allowed by the court \$1,295 for services rendered the receivers; that the services in the receivers' behalf were in contempt proceedings; that the order directing the assets to be held for the payment of fees was entered later.

Attorneys at law can not thus accept employment from adverse litigants at the same time and in the same controversy. Nor does it matter that the intention and motives of the lawyers are honest, as we fully believe them to have been in the present instance. The rule is a rigid one, and designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests rather than to enforce, to their full extent, the rights of the interest which he should alone represent. Weeks on Attorneys at Law, Sec. 271; Farwell v. Great W. T. Co., 161 Ill. 522, 613; Heffron v. Flower, 35 Ill. App. 200; Adams v. Woods, 8 Cal. 306; DeCelis v. Brunson, 53 Cal. 372; McDonald v. Wagner, 5 Mo. App. 56; Spinks v. Davis, 32 Miss. 152; Herrick v. Catley, 30 How. Pr. 208; McArthur v. Fry, 10 Kan. 233.

In McDonald v. Wagner, *supra*, the court said: "Part of the consideration of this note was plainly illegal. An attorney can not recover for legal services rendered by him both to plaintiff and defendant in the same suit. The plaintiff here discloses a case founded upon a cause of action which the law, from wise motives of public policy, forbids. The intentions of the plaintiff were doubtless good; but a lawyer can, under no conceivable circumstances, recover for services rendered in the same suit to parties having opposing interests."

If the determination of this appeal rested solely upon the existence of this rule, we would have no hesitation in the matter; but the question arises as to whether the association might not, with full knowledge of the inconsistent employment accepted by appellant, yet waive the inconsistency and all right to refuse payment by reason of it; and, if this be so, there is the further question as to such a waiver having been effected by the resolution of August 7, 1897. We regard it as of some doubt whether the enforcement of this rule should be treated as a matter of public policy to be insisted upon by the court, irrespective of questions of waiver, or as a matter merely of private interest and subject to waiver by the party interested. If it be subject to waiver, and this board of directors had the power to act in this behalf for the corporation, then we would be led to the conclusion that the resolution in question operated as such a waiver. But, while the authority upon the question is scant, yet we are led by the only authority we find, and by the reason of the rule, to conclude that it ought to be enforced without regard to the resolution of the board of directors.

Some decisions may be found which hold that, when an attorney at law acts with the consent of both adverse litigants, in the character of an umpire, for the determination of their differences, there is then no inconsistency in such employment. But where the employment for each is to protect the respective and conflicting interests as they may arise in the litigation, it is generally held to be against public policy to allow a recovery of compensation.

In *Herrick v. Catley*, *supra*, and in *McDonald v. Wagner*, *supra*, the client sought to be held, in each instance, was aware of the employment by the adverse litigant when the inconsistent employment was entered into. And in the *McDonald* case there was a very complete ratification by the giving of a promissory note for the fees charged, after the services had been rendered. Yet it was held that the contract could not be enforced, as it was against public policy.

We do not regard decisions in cases of agency of others than lawyers as being in point.

It is argued very strenuously by counsel for appellant, that as matter of fact, the set of receivers whom appellant represented, were not adverse in their interests to appellee. But the record shows differently, and the testimony of appellant is that they were "antagonistic." It is apparent that while striving for his clients, the receivers, to maintain the validity of their appointment, he was opposing the interest of his client, appellee, which desired only to effect the discharge of all receivers. He was to be paid out of the same treasury, if at all, for each service. It was distinctly in the interest of his client, appellee, to prevent, if possible, the allowing to appellant of any fees as counsel for the receivers, against whose appointment it was contending. We think that the interests were in fact adverse. But if they were only apparently so from the record of the proceedings, and were in reality, as counsel insist, not so adverse but that counsel could reconcile them in working to one end, yet we are disposed to think that the rule would apply. If the record of the suit shows them to be adverse interests, it is against the reason of the rule to permit the same counsel to represent them, and therefrom have motive for attempting to make them work together.

We are of opinion that, having accepted employment from the receivers, by whom he has been paid, appellant can not now be permitted to recover from appellee for services rendered in the same controversy.

The decree dismissing the petition is affirmed.

J. Alexander McAnson v. Nicholas Martin.

1. RECEIVER—*Compensation of, Where Improperly Appointed.*—Where a receiver has been improperly appointed, and the order appointing him is vacated or reversed, he should not be permitted to reduce the assets by withholding any part thereof for his compensation or for the fees of his attorney.

McAnson v. Martin.

Appeal, by a receiver from an order denying him compensation and attorney fees out of the receivership fund of the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the October term, 1898. Affirmed. Opinion filed May 22, 1899.

Statement of the Case.—This is an appeal by a receiver from an order denying him compensation or attorney's fees out of the receivership fund.

Upon a bill of complaint filed by one Sexton against Blackall and others, appellant was appointed receiver *pendente lite* of certain mortgaged chattels.

Appellee appealed from the interlocutory order appointing the receiver, and this court reversed the order, holding that the receiver had been improperly appointed. *Martin v. Sexton*, 72 Ill. App. 395.

The Superior Court, thereafter, and upon the mandate of this court, vacated the appointment of the receiver and directed that appellant, the receiver, turn over to appellee all the property in his hands as receiver, except cash, and ordered that he file a report. A part of the order is as follows:

"The court also reserves for future consideration the question of the compensation of the receiver and the disposition of the moneys now on hand or in bank."

Appellant then made his report as receiver, showing the amount in his hands, and asking to be allowed the sum of \$1,000 for his own compensation as a receiver, and \$350 for his attorney's fees. Appellee objected to such allowance, and averred that the charges were excessive; that the attorney for the receiver was also attorney for one of the litigants, viz., Sexton, and that the receiver was entitled to no compensation out of the funds, but should be paid by the complainant, if by any one, who had wrongfully procured his appointment. The report of the receiver and the objections thereto were referred to a master in chancery to take evidence and report conclusions. After hearing evidence, the master reported that the receiver is not entitled as a matter of law to be compensated from the funds in

his hands as receiver, and included in his report the following: "In the event that the court shall hold that I have erred in finding the law to be as above stated," then to avoid a re-reference, finds that \$450 would be reasonable compensation for the receiver; that the attorney for the receiver was not attorney for Sexton, party to the suit; and that a reasonable fee for such attorney would be \$250. The master's fees for taking testimony and making report are indicated as \$200. A stipulation in the proceeding is to the effect that the fees of the shorthand reporter may be included by the master as part of his fees and taxed with the costs.

The court overruled exceptions to the master's report and entered the final order appealed from. By that order the court adjudges that appellant, having been wrongfully appointed a receiver, at the instance of Sexton, complainant in the bill of complaint, and the order appointing him having been vacated, he is not entitled to retain any of the funds in his hands as receiver for compensation to himself or for fees of his attorney; and he is ordered to refund the sum of \$150 already paid by him to his attorney out of the receivership funds. The court finds that the "reasonable and just fees and costs of reference" are \$200, and decrees that the amount be taxed as costs against appellant.

MARCUS KAVANAGH and ALEXANDER S. BRADLEY, attorneys for appellant.

FLOWER, SMITH & MUSGRAVE, attorneys for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

That the receiver was improperly appointed, has been already adjudicated by this court. *Martin v. Sexton*, 72 Ill. App. 395.

It has been repeatedly held that where a receiver has been improperly appointed and the order appointing is vacated or reversed, the receiver should not be permitted to reduce the assets by withholding any part thereof for com-

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pensation to himself or for fees of his attorney. The latest of these decisions is Highley v. Deane, 168 Ill. 266.

But it is contended by counsel for appellant that no such determination of the matter of the receiver's compensation and his attorney's fees should be made until a final disposition of the cause and an ascertainment thereby of the merits of the controversy. The decisions in this State do not support this contention. On the contrary it seems to have been the practice to determine at the time of the vacating of the appointment of the receiver and the return by him of the funds and property in his hands, that he should not retain any of such funds by way of compensation for himself or fees for his lawyer. Einstein v. Lewis, 54 Ill. App. 520; Myres v. Frakenthal, 55 Ill. App. 390; Young v. Ruton, 69 Ill. App. 513.

Objection is made that no reference to a master should have been ordered as to the amount of compensation and attorney's fees until the court had determined whether any such compensation or fees might be allowed. It might have been a wiser and more economical course to have proceeded as suggested. But appellant appears to have assented to the reference, made no objection in the trial court, and can not be heard now, for the first time, in this behalf. The master's fees are objected to as costs. It appears that it was stipulated that the stenographic work should be included as costs. No sufficient ground is pointed out for holding that the costs taxed are improper.

The decree is affirmed.

82	435
88	515
184	24
82	435
107	4801

Henry Brueggestradt v. Karl G. Ludwig, Anna C. Ludwig, Edwin S. Hartwell, William H. Mulholand, William Thiel, Anton Dietsch and Richard C. Hedrich.

1. **EQUITY PRACTICE—Hearing on Exceptions Before the Chancellor is Confined to the Evidence Before the Master.**—Depositions which were not offered before the master, and were not considered by him, can not be considered by the chancellor on the hearing of exceptions to the

master's report. The chancellor has no right to consider any evidence not before the master.

2. *SAME—Presumptions in Favor of the Master's Report.*—Where an order of reference directed the master to consider all testimony, depositions and proofs theretofore taken in the cause in the absence of an affirmative showing that the master disobeyed the order of reference, this court will presume that he did his duty and obeyed the order.

3. *SAME—Where the Master Erroneously Rejects Testimony.*—Where the master erroneously refuses to hear and consider evidence, the proper practice is to re-refer the cause to the master, with directions to admit the testimony and proceed with the matter accordingly.

4. *SAME—Master's Findings Advisory.*—The master's findings are entitled to great weight when he has heard the witnesses, but they are not entitled in an appellate tribunal to the same consideration as that of the chancellor where he has heard the witnesses. Such findings are only advisory to the chancellor.

5. *DURESS—Where Courts of Equity Will Afford Relief.*—Where the action of a creditor is oppressive and unconscionable, and intended to coerce the debtor into the performance of an act against his interest, a court of equity will afford relief.

6. *DECREES—Must be Supported by the Allegations of the Bill.*—It is not enough that the proof makes a good case. If there is no allegation to which the proof may be applied, there can be no decree.

Bill of Foreclosure.—Appeal from a decree of the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1898. Affirmed in part and reversed in part with directions. Opinion filed May 22, 1899.

Statement of the Case.—Appellant, on October 4, 1895, filed his bill in the Superior Court of Cook County to foreclose two trust deeds made by appellees Karl G. Ludwig and wife, one dated October 1, 1894, to Otto C. Butz, trustee, and William J. Haerther, successor in trust, to secure the note of said Ludwig for \$2,000, due in five years from date, with interest at seven per cent per annum, payable semi-annually, the interest being evidenced by ten coupon notes of \$70 each providing for foreclosure in case of default in payment of principal or interest for thirty days or of waste, or of non-payment of taxes; the other trust deed dated March 20, 1895, to William Gibson, trustee, to secure the note of said Ludwig for \$225, due in five years from date with interest at seven per cent per annum payable semi-annually, the interest being evidenced also by coupon notes

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of \$7.87 each, providing for foreclosure in case of default in payment of principal or interest for thirty days or of waste, or of non-payment of taxes, and both said trust deeds conveying the same property, a lot in Rogers Park, Cook county, Illinois.

The grounds of the foreclosure alleged were default in payment of interest becoming due October 1, 1895, on the note of \$2,000, waste and failure to pay taxes. A receiver was appointed pursuant to the prayer of the bill.

Among other defendants to the bill were Edwin S. Hartwell, William Thiel and Richard C. Hedrich, who claimed mechanics' liens on the property, and Anton Dietsch, a judgment creditor of Ludwig, who was allowed to intervene on petition by him filed and have his rights adjusted.

The lien claimants all answered the bill and also filed cross-bills except Hedrich, who made his answer a cross-bill. William H. Mulholand filed an intervening petition January 9, 1897, asking to be made defendant, which was allowed and on January 13, 1897, filed his cross-bill by which he claimed to have acquired title in fee to said property by quit-claim deed from Ludwig and wife dated October 28, 1896, and that the two trust deeds described in appellant's bill were fraudulent and without and consideration except as to the sum of \$155 under the trust deed of March 20, 1895, and asking the cancellation of the trust deed of October 1, 1894, and also of the trust deed of March 20, 1895, except as to the sum of \$155, which he offered to pay to appellant and also offering to have reconveyed to appellant, or as the court might direct, a certain South Dakota farm referred to *infra*.

September 22, 1896, Ludwig and wife were defaulted on the original bill, but on April 28, 1897, they filed their petition asking that their defaults be set aside and for leave to answer, which was allowed. They answered, and also July 9, 1897, filed their cross-bill making the same claims as to the two trust deeds described in the original bill as Mulholand, setting forth the facts constituting the fraud in substance as shown *infra* in the findings of the decree, admit-

ting they had conveyed said lot to Mulholand as he alleged, but that the conveyance was in the nature of a mortgage and made the same offers to do equity as made in the cross-bill of Mulholand.

William J. Haerther, who was made a defendant to the bill and all the different cross-bills, and was charged in the cross-bills of Mulholand and the Ludwigs, together with appellant, with conspiracy to defraud the Ludwigs, made default, and his evidence was not taken by any of the parties.

October 14, 1896, the cause being then at issue as to the original bill, the intervening petition of Hedrich and the cross-bills of the lien claimants, it was referred to a master to take proof and report the same with his opinion on the law and evidence.

After the depositions of Herman Zarnecke, William W. Hopkins and John J. Myers, witnesses on behalf of the lien claimants and Mulholand, had been taken and filed in the Superior Court, and after considerable testimony had been taken before the master, the issues were made up on the cross-bills of Mulholand and the Ludwigs, and both said cross-bills, upon the issues so made, were in August and September, 1897, referred to the same master to take proof and report his conclusions thereon of law and fact, and the master was thereby ordered to consider all testimony, depositions and proofs theretofore taken in the cause.

The hearing proceeded before the master, and after the evidence was closed, appellees moved the chancellor to direct the master to admit in evidence certain examined copies of the Cook county records and testimony respecting the same offered before the master, November 30, 1897, which motion was continued for hearing until the coming in of the master's report upon the whole case.

The master made his report, and after hearing the objections of the respective parties thereto, it, together with said objections, was filed in court March 16, 1898. The objections were ordered to stand as exceptions, and the hearing was had April 19, 20, 21 and 22, 1898, before the

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chancellor upon all the pleadings, the master's report, the evidence taken and offered before the master, including the evidence which was offered November 30, 1897, which the master refused to admit, the depositions of Zarnecke, Hopkins and Myers, and the exceptions to the master's report. It does not appear at what time the chancellor made his decision on the exceptions to the master's report. June 7, 1898, the draft of a final decree was presented to the chancellor to be entered, whereupon appellant moved to strike out of said draft the part thereof which found that the master was in error in rejecting the evidence offered by the appellees November 30, 1897, above mentioned, and finding that said evidence was properly before the chancellor for consideration on the hearing of the master's report, which motion the chancellor denied. The chancellor also, at the same time, denied the motion of appellant, then made, to re-refer said cause to the master, with directions to permit him to offer proof in explanation and rebuttal of said testimony offered November 30, 1897.

The rules of the Superior Court governing masters in chancery provide, among other things not here material, that on a reference to take proof and report "his conclusions thereon to the court, the master shall have full power and discretion to pass upon all questions of competency of witnesses and the propriety and relevancy of all questions or interrogatories put by counsel, and the master shall note his ruling upon each objection in the minutes of the proceedings before him, and when the master has ruled that a party or witness shall answer a given interrogatory it shall be the duty of such witness or party to answer in the same manner as if such witness or party had been so directed by the court, and in case that the master shall hold that any question is irrelevant or incompetent, the same shall not be answered. If either party shall except to the ruling of the master upon the admissibility of testimony or evidence, they shall, after the testimony and evidence before the master is closed, and before he makes his report, thereon, bring such objections and exceptions to the master's ruling upon

the testimony before this court, and if the court shall sustain the ruling of the master, he shall immediately proceed to make his report upon the testimony and evidence submitted to him, and if such objections and exceptions to the rulings of the master shall be sustained, the master shall proceed to take such further testimony as the court may direct and shall disregard, in making up his report, such testimony as the court may rule to be incompetent or irrelevant."

A part of the evidence so offered before the master, on November 30, 1897, and rejected by him, was that of witness George D. Cole, by whom appellees' counsel offered to prove that certain papers, purporting to be copies of various entries and records in the recorder's office of Cook county, were true copies of such entries and records, and that he examined said entries and records and compared said purported copies therewith, and found the same to be true and correct copies of said entries and records. The chancellor sustained appellees' exception to the rulings of the master in this respect but it does not appear from the record that the offered testimony of this witness was taken either by the court, or the master.

The report of the master, after making numerous findings of fact and conclusions of law based thereon, to the effect, in substance, that there was no fraud in reference to the two trust deeds sought to be foreclosed and that appellant was entitled to decree foreclosing the same for the sum of \$2,684.55, which he found to be due thereon; that there was due also to the several lien claimants the several amounts claimed by them, with legal interest, and to the judgment creditor Dietsch, \$424.30, and that they, respectively, were entitled to liens on said property, giving preference to each of said liens on certain proportions of the value of the property, not necessary to be here enumerated.

The chancellor entered the final decree June 7, 1898, which, after reciting that the hearing was had upon the several matters, as above stated, sustains all the exceptions of Ludwig, Mulholand and Hartwell thereto, approves

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the report as to the amounts found due the lien claimants and the judgment creditor, Dietsch, and finds in substance, viz.:

On May 18, 1893, and for several years prior thereto, appellant and Haerther were on terms of intimate business acquaintance and dealing, and appellant, on that date, had loaned to Haerther \$4,000 on his note due on or before one year thereafter, which was secured by a trust deed to appellant on property in Cook county, which appellant believed to be a first lien thereon, but which was in fact a junior lien, as Haerther then well knew. Haerther did not pay appellant this note at maturity; appellant discovered in the summer of 1893 that his lien was a junior lien, and demanded that Haerther repay the \$4,000, or produce good security therefor. Haerther, who was, on October 22, 1894, insolvent and financially irresponsible, had to that date failed to comply with appellant's demands.

October 1, 1894, Ludwig, being the owner in fee of the premises in question in Rogers Park, desiring to erect a dwelling thereon for a home, in order to provide funds therefor, made the \$2,000 note and interest notes evidencing the interest on the principal note above described, and together with his wife, made the said trust deed to Butz. On the solicitation of Haerther, Ludwig delivered these securities to Haerther, as agent for an undisclosed principal who would purchase the same if the security proved good, the notes being executed by and payable to the order of Ludwig, and by him indorsed in blank, and Haerther then agreed to pay over to Ludwig the sum of \$2,000 if the securities for the proposed loan proved satisfactory, but he fraudulently converted the notes and trust to his own use, and refused to account to said Ludwig therefor, or to pay him said \$2,000, or any part thereof.

On October 22, 1894, appellant, knowing of Haerther's fraud in converting said securities to his own use, by fraudulent coercion and collusion with Haerther, obtained said securities from Haerther as part payment upon, or as a better security for, the said amount due from Haerther to

appellant, but that appellant paid no consideration for said securities at the time of obtaining the same. Appellant also knew at this time that Haerther was habitually dishonest in his business methods and dealings, and had been before that time financially associated and interested with Haerther in the promotion and outcome of other dishonest and unlawful enterprises.

Before taking said securities appellant made no inquiry of Ludwig in relation thereto, and as Haerther was his agent, appellant is charged with notice of all the facts and circumstances relating to Haerther's possession of the securities, and the absence and want of consideration therefor. Appellant failed to prove that he acquired said securities from Haerther in good faith for value and in the usual course of business.

The transfers of said securities from Haerther to appellant was fraudulently concealed from Ludwig until January, 1895, whereupon Ludwig immediately applied to appellant for a payment of the \$2,000 promised by Haerther, and continued to look to appellant for payment thereof.

From October 22, 1894, to February 26, 1895, appellant and Haerther, in their relations and dealings with Ludwig, pursued a course of fraudulent concealment, evasion and delay, by means of which Ludwig was worn out, disheartened and impoverished, and his family reduced to want and distress for the common necessities of life, and he was rendered unable to further press his claim on appellant. Appellant and Haerther, took fraudulent advantage of Ludwig's necessities and exhausted condition, and did, in January and February, 1895, confederate, conspire and co-operate by artifice and intimidation to trick and coerce Ludwig into taking something else of little or no value in lieu of the cash due him, and by the false and fraudulent representations of appellant and Haerther, and by their oppressive and unconscionable conduct toward Ludwig he was, on February 26, 1895, induced to take in settlement of his claims the sum of \$135 cash, and an equity of redemption in a farm in South Dakota, and to convey said prop-

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erty at Rogers Park, by warranty deed, to one Hendricks, the attorney of appellant, in secret trust for appellant, to surrender to Haerther certain of his promissory notes, and to allow appellant to sell for him, Ludwig, certain stock of the Ristow-Poths Manufacturing Co., then belonging to Ludwig, for the sum of \$1,000 in cash, which appellant promised to do.

Appellant falsely represented and warranted said farm in South Dakota to be of the value of \$2,000 in cash, which was subject to a mortgage of \$400, and was of little or no value above the mortgage, as appellant then well knew. Ludwig, in making said settlement, acted without the advice of counsel, and under the stress of necessitous conditions, induced by the wrongful acts of appellant, and Haerther was at the time in a situation of equitable duress.

This agreement was not carried out by appellant as to the sale of the stock and payment to Ludwig therefor of \$1,000, and he also fraudulently held and retained the warranty deed to said Hendricks. While appellant, through Hendricks, held the title to said Rogers Park lot, he became obligated to pay out for improvements thereon \$155, which entered into and became part of the consideration for the note of \$225 and trust deed securing the same hereinbefore described. He also, during that time, threatened to evict Ludwig from said premises unless he paid to appellant, as rent therefor, \$14 per month.

On March 20, 1895, Ludwig, acting under the force and pressure of circumstances as above stated, and being in a condition of equitable duress thereby, made and delivered to appellant said note of \$225, and with his wife executed the said trust deed to Gibson securing the same, whereupon appellant destroyed said warranty deed to Hendricks.

The consideration and inducement for the making of the last mentioned note and trust deed, was Ludwig's reinvestment with the legal title of the Rogers Park lot, the discharge of Ludwig from \$70 interest on said \$2,000 note, the forbearance of appellant to evict Ludwig from said premises, and forbearance to foreclose the trust deed of October

1, 1894, thereon, and the said sum of \$155 paid by appellant. The actings and doings of appellant from the month of January, 1895, to and including the taking of the note and trust deed of March 20, 1895, were part and parcel of a continuing fraudulent scheme and design to deprive Ludwig of said Rogers Park lot, without just compensation, and the payment of said \$155 by appellant was induced and brought about by reason of appellant's own fraud and wrongdoing; that it was no consideration for said note of \$225, and he was not entitled to any lien on said Rogers Park property under the trust deed of March 20, 1895, but only to a credit *pro tanto* on the amount of \$525 due from appellant to Ludwig, hereinafter stated. Appellant did not show that he was lulled into a sense of false security by the making and delivery to him of the note and trust deed of March 20, 1895, by Ludwig, nor had appellant shown himself to have taken any action prejudicial to his rights against Haerther by reason thereof.

On February 26, 1895, when said South Dakota farm was conveyed to Ludwig, it was incumbered by a mortgage of \$400, bearing interest at eight per cent per annum, on which there was overdue and unpaid for interest on that date the sum of \$32. On the return to appellant of the title to the South Dakota farm, he is chargeable with the amount of said mortgage, said interest of \$32, and lawful interest from February 26, 1895, to the date of the decree, which was found to be \$525. On October 28, 1896, Ludwig and wife, by their quit-claim deed, conveyed said Rogers Park lot to the appellee Mulholand, as a mortgage and security for a certain indebtedness theretofore incurred by Ludwig. The decree then ordered and directed that Ludwig and wife forthwith convey to appellant, by good and sufficient deed, said South Dakota farm, describing it specifically; that said appellant surrender and cancel said \$2,000 note, the said coupon notes evidencing the interest thereon, and the trust deed securing the same, also the \$225 note, the interest notes evidencing the interest thereon, and the trust deed securing the same, and that he also pay to Lud-

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wig the said sum of \$525 in cash, and in default of appellant complying with the decree in surrendering and canceling said notes and trust deeds, that the master in chancery release the same. It was further ordered and decreed that the receiver surrender possession of said Rogers Park lot to Ludwig, render an account of his receipts and disbursements, and also to pay to the clerk of the court all moneys remaining in his hands received from the rents and income thereof, to remain subject to the further order of the court. Also, that if the surplus in the receiver's hands should, on the auditing of his account by the master (which was directed), be in excess of \$285, then such amount should be paid to Ludwig, and if such surplus should be less than \$285, then such amount should be paid by Ludwig to the clerk of the court, to remain subject to the further order of the court. It was further ordered and decreed, that within thirty days after said Ludwig should be admitted to the possession of the Rogers Park lot, he should pay to said lien claimants and Dietsch the amounts severally found to be due thereon, and in default thereof, that said premises be sold to satisfy such amounts at such time and place and in such manner as the court might direct.

DENNIS & RIGBY, attorneys for appellant.

MANNING & COLE, attorneys for appellees.

MR. PRESIDING JUSTICE WINDES, after making the above statement, delivered the opinion of the court.

A thorough examination of the master's report, the exceptions thereto, and the evidence, in the light of counsels' arguments, lead us to the conclusion the master's report, that there was no fraud in reference to the two trust deeds sought to be foreclosed, is not sustained by the evidence, and that the findings of fact made by the chancellor, the substance of which is contained in the statement preceding this opinion, are in the main correct, and also that the decree, except as will be stated *infra*, is correct. The finding

of the decree that Ludwig, in making and entering into the agreement with appellant and Haerther, by which the South Dakota farm was conveyed to him, "acted without the advice of counsel," is not, in our opinion, sustained by the evidence. We think the evidence shows that he acted in disregard of the advice of his counsel, and because of his necessities, and by reason of the fraudulent, oppressive and unconscionable conduct of appellant and Haerther toward him. The finding of the decree that the incumbrance on the South Dakota farm bore interest at eight per cent per annum, and that there was due and unpaid \$32 interest thereon on February 26, 1895, and that \$525 is a reasonable sum to be paid by appellant to Ludwig on account of said incumbrance and interest, when Ludwig should return the legal title of said farm to appellant, is not sustained by the evidence, except as to the sum of \$400, the amount of said incumbrance, and for that amount only in the event the legal title of said farm should be returned to appellant cleared of said incumbrance, as well as all other claims or liens thereon caused by Ludwig, or by any one who held the title for Ludwig, up to the time of such reconveyance to appellant. The evidence shows that this land was conveyed to one J. A. Brenner, and the person holding the incumbrance on it was L. J. Brenner. There is no evidence that the incumbrance was ever paid by Ludwig, or by any one for him. The direction of the decree in this regard was therefore erroneous.

The direction of the decree that the receiver pay any surplus which might, on an accounting by him, be found in his hands in excess of \$285 to Ludwig, does not seem to be based on any finding of fact by the master or the court, nor upon any evidence to which our attention has been directed, or which we have been able to discover in the record. Inasmuch, however, as in the view we take of the rights of appellant, he can have no interest in the funds in the receiver's hands, and as no one else has complained of this part of the decree, we see no reason why it should be disturbed.

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Prior to the submission of this cause, two motions were made, one on behalf of the appellee Thiel, and the other on behalf of the appellee Hartwell, suggesting diminutions of the record and asking leave to supply the same by filing supplemental records, which motions were reserved to the final hearing. These supplemental records relate solely to the respective mechanics' liens claimed by these appellees. If we are correct in the conclusions we have reached, appellant has no interest in the allowance of these claims, no one else complains of them, and we, therefore, do not pass upon these motions.

It is claimed that the chancellor erred in considering on the hearing of the master's report certain depositions, being those of the witnesses Zarnecke, Hopkins and Meyers, taken at Redfield, Dakota, because, it is said, they were not offered before, and were not considered, by the master. If the depositions were not offered before the master, and were not considered by him, it would have been error in the chancellor to consider them on the hearing of exceptions to the master's report. The chancellor has no right, on the hearing of a master's report, to consider any evidence not before the master. *Prince v. Cutler*, 69 Ill. 267-72; *Cox v. Pierce*, 120 Ill. 556-9.

But, as shown in the statement above, the order of reference directed the master to consider all testimony, depositions and proofs theretofore taken in the cause. In the absence of an affirmative showing that the master disobeyed the order of reference, we will presume that he did his duty and obeyed the order.

Moreover, it appears by a stipulation of counsel entered into before the master during the progress of the hearing, which refers to the testimony of these very witnesses, he thereby recognizes these depositions as being before the master. Also, the master in his report says that considerable testimony was taken upon the question of the value of the South Dakota farm. The depositions of these three witnesses relate wholly to that subject, and there is not much testimony aside from these depositions relating to the

value of this farm. We think appellant's claim in this respect is not tenable. We are of opinion that the chancellor did not err in sustaining the exceptions of appellees to the rulings of the master, in rejecting the testimony offered by them on November 30, 1897, because the copies of entries and records then offered related to the dealings between appellant and Haerther prior to October 22, 1894, which, if they were correct copies, as was offered to be shown by the witness Cole, they were competent and material evidence on the questions as to whether, prior to that date, appellant and Haerther had intimate business relations toward each other; that Haerther was indebted to appellant in a large amount, as far back as May 18, 1893; that appellant knew that Haerther was habitually dishonest, and, whether, on October 22, 1894, appellant caused to be released certain incumbrances on Haerther's real estate, then owned, or which had been owned by him. But having so ruled, we think the proper practice to have been pursued was to re-refer the cause to the master, with directions to admit the testimony of the witness Cole, when he could have been cross-examined and appellant would have had an opportunity, if he so desired, to offer evidence to disprove Cole's testimony, or to explain, if he could, the several entries and records. The rules of the Superior Court, we think, contemplate such a practice as we have indicated, though, no doubt, they authorize the court to direct otherwise. Under the circumstances here shown, the offered evidence of the copies of the entries and records was not complete or competent, under the objections of appellant's counsel, made at the time, that they were not certified, and there was no other proof of their genuineness and correctness, without the testimony of the witness Cole that they were true copies. The testimony of Cole was not taken, and therefore there was no proof before the chancellor that these purported copies were true copies of said entries and records. Some of the findings of the decree are, in part at least, based on this offered evidence, but if the evidence which was properly admitted was sufficient to sustain the decree of the court, the error was harmless. *Dunn v. Berkshire*, 175 Ill. 243.

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Appellant, on cross-examination, admitted that he gave the money to Haerther which he claims was the consideration for the purchase by him of the \$2,000 note and trust deed, six months before October 22, 1894, and declined to swear that it was not paid to him twelve months before; said that he did not know exactly when it was. Also, when asked if he did not have trouble with Haerther about an amount which he claimed that Haerther owed him in the summer of 1894, said that he did not remember. He also said that he did not pay Haerther on October 22, 1894. The witness Arenz testified that he was present when Ludwig told appellant that he, appellant, "got the papers from Haerther by threats," and that thereupon appellant told Ludwig he was not yet Amercanized, and put Ludwig out of appellant's saloon.

The witness Gibson testified that appellant told him "that Haerther owed him (appellant) the money and he got this \$2,000 trust deed because he did owe him the money," and also that appellant said he obtained this note and trust deed "in satisfaction of a debt that Haerther owed him." We think the clear preponderance of the evidence, properly admitted, is that on and for a long time prior to October 22, 1894, Haerther was indebted to appellant to an amount exceeding \$2,000, and that he received this note and trust deed from Haerther in part payment thereof, or as additional security for such indebtedness, and also that he knew that Haerther was not the owner of the note and trust deed, and had no right to dispose of them except for cash. Appellant therefore failed to prove that he obtained this note and trust deed upon the payment by him of \$2,000 cash, in good faith and without notice of Ludwig's rights, as he claimed to have done.

It is claimed by appellant that this note and trust deed in his hands are not affected by any equities between Ludwig and Haerther—that Haerther was Ludwig's agent to negotiate them, and as such agent transferred a good title to appellant, upon the theory that he is in the position of an original mortgagee, and cites in support of this con-

tention, *Keohane v. Smith*, 97 Ill. 156; *McIntire v. Yates*, 104 Ill. 491; *R. R. v. Thompson*, 103 Ill. 187, and other cases. These cases are not, in our opinion applicable, because he has not shown that he paid value or parted with any rights, and had constructive if not actual notice that Haerther had no right to dispose of the securities except for cash. Had he paid the cash to Haerther at the time, a different question would be presented.

The further claim is also made that Ludwig, when notified of the transfer to appellant, recognized and ratified the validity of such transfer by promising to pay the interest on the note, and that by the receipt of \$135 from appellant, and the agreement of settlement pursuant to which he received the conveyance of the farm in South Dakota, and made and delivered the two notes and trust deeds of \$225, in which was included the first interest note of \$70, which became due on the \$2,000 note, and by the arrest of Haerther, which, it appears, was caused by Ludwig upon the charge of embezzlement, Ludwig is now estopped from alleging the invalidity of either of these trust deeds. We think this contention is answered by the findings of the court, which in our opinion are sustained by the evidence, that all these actions of Ludwig and transactions with him were induced by the fraudulent, oppressive and unconscionable conduct of appellant and Haerther toward Ludwig, and by his necessities and the stress of circumstances under which he was placed by reason thereof, amounting to moral duress. *Brown v. Gaffney*, 28 Ill. 149-58; *Russell v. Southard*, 12 How. (U. S.) 138; *Montgomery v. Pickering*, 116 Mass. 227-9.

In the *Brown* case, *supra*, the court held that where the action of a creditor was oppressive and unconscionable, and intended to coerce the debtor, it called for the interposition of a court of equity to afford relief. In the *Russell* case, *supra*, it was held that where a debtor was in distress for money, and a stranger without funds or resources, his consent to a sale of his property for a grossly inadequate consideration, at the dictation of a money lender who took

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advantage of the pressure of his wants, a court of equity would not consider a consent thus obtained was sufficient to fix the rights of the parties—that “necessitous men are not, truly speaking, free men,” and that “an unconscientious advantage, which ought not to be retained,” was sufficient to be shown to avoid such a purchase. In the Montgomery case, *supra*, which is to the same effect in principle, it was also held that the original fraud was not cured nor waived, although the party defrauded subsequently made a deed conveying away her rights, under legal advice, with full knowledge of the original fraud and of her legal rights.

In this connection it is also claimed that both the cross-bills of Mulholand and Ludwig show a complete ratification by Ludwig of the validity of the note and trust deed of \$2,000, and a settlement of Ludwig’s claims against Haerther. These cross-bills set forth the facts substantially as found by the decree, which, as we have seen, when all taken together, do not amount in equity to a ratification or settlement which should bind Ludwig or estop him.

It is also argued that as the master heard the witnesses, his findings ought to carry great weight—that he was in a better position to judge of the facts than the chancellor, and his findings should have the same weight which is accorded to the findings of a chancellor when the witnesses are heard in open court. While it is true that the master’s findings are entitled to great weight when he has heard the witnesses, it has not been held that they are entitled in an appellate tribunal to the same consideration as that of the chancellor when he has heard the witnesses. The master’s findings are only advisory to the chancellor. Fairbury, etc., Bd. v. Holly, 169 Ill. 12; Ennesser v. Hudek, Id. 494.

The contention is made that appellees have been successful before the chancellor only upon the theory that, under the rule announced in Olds v. Cummings, 31 Ill. 188, and repeatedly followed in this State, appellant took the note and trust deed of \$2,000 subject to all equities between Ludwig and Haerther, and that this theory must fall because no such case is made by the pleadings. We do not think

the rule in *Olds v. Cummings* need be invoked to sustain the decree, and are inclined to the opinion the rule of that case is not applicable here. Appellant may be considered as the original mortgagee, but can not prevail, because his money was not paid for the note and trust deed. He parted with nothing, and knew Haerther had no right to dispose of the securities except for cash, or should have known the circumstances within his knowledge being considered. It is also said the finding in the decree, that Haerther was appellant's agent when he received the note and trust deed from Ludwig, is improper and can not stand because there is no such allegation in the pleadings—that it is not enough that the proof makes a good case if there is no allegation to which the proof may be applied. Ludwig's cross-bill, as we have seen, substantially alleged the facts as found by the decree, and from those facts the conclusion follows that Haerther was appellant's agent. It was not necessary that the pleadings in so many words should have a direct averment that Haerther was appellant's agent. In the view we have taken of appellant's claim, he is not interested in the mechanics' liens nor in the judgment against Ludwig; no one else makes complaint thereof, and we therefore do not discuss the questions raised by appellant with reference to either of these liens.

The other contentions made by counsel in their briefs, both as against and in support of the decree, have been given consideration, but we deem it unnecessary to refer to them specially, as none of them could effect the disposition of the case which we have made. The decree is affirmed in all respects, except as indicated with reference to the South Dakota farm and the payment to Ludwig of \$525 by reason of the incumbrance thereon, and interest, in which respects the decree is reversed, with directions to the Superior Court to modify it so that it shall direct a re-conveyance of the South Dakota farm to appellant, free and clear of all claims, liens and incumbrances done or suffered by F. Arenz or his grantees to the date of such conveyance, and the incumbrance of \$400, within a time to be fixed, but

before appellant shall be required to cancel and surrender said notes and trust deeds, and that appellant pay to Ludwig the sum of \$400, the amount of said incumbrance, less the sum of \$155, due from Ludwig to appellant, simultaneously with such conveyance.

Affirmed in part and reversed in part, with directions.

**Chicago & G. T. Ry. Co. v. Charles W. Hoffman,
Adm'r, etc.**

1. **DAMAGES—Recoverable for Negligence.**—Damages which are recoverable for negligence must be such as are the natural and reasonable results of the defendant's acts, and the consequences must be such as, in the ordinary course of things, flow from the acts, and be reasonably anticipated as a result.

2. **SAME—Proximate Damages Defined.**—Proximate damages are such as are the ordinary and natural results of the omission or commission of acts of negligence, and such as are usual and might have been reasonably expected.

3. **NEGLIGENCE—Jumping from Trains.**—Where the injury complained of is not the result of any wrongful act or negligence of the defendant, but is caused by the voluntary act of the plaintiff in jumping from the train while in motion, such jumping is the proximate cause of the accident, and he can not recover.

4. **SAME—When to be Imputed to Children.**—Negligence will be imputed to a boy eleven years of age in the absence of evidence tending to show his incapacity to exercise care.

5. **SAME—Carelessness in Children.**—Carelessness in children who are of age sufficient to exercise discretion for the avoidance of injury to themselves, when traveling on street cars, is recognized, although negligence is not imputed to children of tender age.

Action in Case.—Death from negligent act. Trial in the Superior Court of Cook County; the Hon. SAMUEL C. STOUGH, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Reversed. Opinion filed May 22, 1899.

SAMUEL A. LYNDE, attorney for appellant.

This court says, speaking of the action of a boy ten years of age in attempting to jump onto a moving freight train,

jumping from the ground upon a moving freight train is dangerous. All men and all ordinarily intelligent boys of ten years of age know it to be so. *Le Beau v. P., C., C. & St. L. Ry. Co.*, 69 Ill. App. 557; *C., R. I. & P. R. R. Co. v. Eininger*, 114 Ill. 79.

CASE & HOGAN and MUNSON T. CASE, attorneys for appellee, contended that the question whether or not the deceased was exercising the degree of care reasonably to be expected under the circumstances from a child of his years, was a question of fact for the jury.

This child under the decisions was of an age when he could not comprehend the danger he was incurring in attempting to get off from said moving train. See *The Allurement of Infants*, 31 Am. Law Review, 891; *North Western Ry. Co. v. Hack*, 66 Ill. 242; *Hemmingway v. Chicago, M. & St. P. R. R. Co.*, 72 Wis. 42; *Brennan v. Fair Haven & W. Co.*, 45 Conn. 284; *East Saginaw City Ry. Co. v. Bohn*, 27 Mich. 503; *R. R. Company v. Caldwell*, 74 Penn. St. 424; *R. R. Company v. Stout*, 17 Wall. 657; *Wilton v. Middlesex R. R. Co.*, 107 Mass. 109; *Wynn v. The City & S. Ry. of Savannah*, 91 Ga. 345; *Metropolitan St. Ry. Co. v. Moore*, 83 Ga. 453; *R. R. Company v. Rexroad*, 59 Ark. 180; *Ridenhour v. K. C. Cable Ry. Co.*, 102 Mo. 270; *Phil. City Passenger Ry. Co. v. Hassard*, 75 Penn. St. 367; *Saare v. Union Ry. Co.*, 20 Mo. App. 211; *Fetter on Carriers of Passengers*, Sec. 110.

It was held in some English cases that if the child's own act directly brings the injury upon him while the neglect of the defendant is such as exposes the child to the possibility of injury, the latter can not recover damages; but these decisions have been condemned in England and are directly opposed to the current of American cases. *Shearman & Redfield on Negligence*, 4th Ed., Vol. 1, Sec. 73.

As a general rule it is negligence for an adult person to jump from a train of cars while in motion, but this is not an inevitable rule. In view of this exception to the general principle the plaintiff here being of such tender age and

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under such great fear and excitement and with the apprehension that he would be carried away and beyond his destination if he did not get off at the platform may well be exonerated from all blame. The age and lack of capacity of the plaintiff must be considered in such a case, even if he is of such age as to be *sui juris* in respect to many other things. 2 Thompson, Negligence, 1180.

What might appear to be reasonable to a person of such tender age might be most unreasonable to an adult person of more discretion, and it was for the jury to take such differences into consideration in determining the question of contributory negligence to the plaintiff. Barry v. Railway Company, 92 N. Y. 289; Byrne v. R. R. Co., 83 N. Y. 620; Berge v. Gardiner, 19 Conn. 507; Swoboda v. Ward, 40 Mich. 420; Lynch v. Smith, 104 Mass. 57; Plumley v. Birge, 124 Mass. 57.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment rendered in action on the case by appellee against appellant, under Chapter 70 of the Revised Statutes, which gives an action to the administrator of a deceased person, when the death of his intestate was caused by the wrongful act, neglect or default of any person or corporation, and which, if death had not ensued, would have entitled the intestate to maintain an action. The trial occurred in June, 1898, and was the second trial of the cause. The jury found for appellee, and assessed the damages at the sum of \$2,500, and judgment was rendered on the verdict. The declaration contains three counts. It is averred in the first count, in substance, that Charles Hoffman, Jr., plaintiff's intestate, was a child of the age of, to wit, twelve years, of immature discretion and imperfect judgment; that appellant on, to wit, October 18, 1893, was a common carrier of passengers and was operating certain lines of railway and certain suburban trains, from a station called Chicago Lawn, at or near Sixty-third street, about six miles from its main station in Chicago; that it was appellant's duty to said intestate, in the event he was about

to become a passenger, to exercise ordinary care in and about receiving and discharging passengers from its trains and to use reasonable precautions to prevent said intestate, who was about to become a passenger on a regular suburban train then due at Sixty-third street, bound north, and who was provided with a ticket for use on said train, into the city of Chicago, from getting on any other than its regular suburban train, then about due; that appellant failed to exercise any such precautions, and wrongfully, carelessly and negligently permitted said intestate to get upon the pay train at Sixty-third street station, which was there on the time of the regular suburban train, he supposing that it was the suburban train; that said intestate, on reaching Fifty-ninth street, where he expected his mother to board the train, seeing his mother, and the train not stopping, without knowledge or appreciation of the danger, and exercising due care and caution for one of his years, stepped off the train while it was moving, his head striking against the oil box of a standing car and was mortally injured, the result of which injury was his death.

The second count differs from the first in averring that it was the duty of appellant to exercise reasonable precautions to prevent appellee's intestate from getting on the pay train, or in the event of receiving him on the train, to prevent him from falling or stepping off the train before reaching his destination, and that appellee, after receiving him on the train, permitted him to stand on the platform of the pay car, etc. After the evidence was all in and before the court instructed the jury, appellant, by leave of the court, filed the third or additional count. It is averred in this count that appellant received the deceased on one of its pay trains at Chicago Lawn station as a passenger to be carried north; that it was appellant's duty, knowing his age, lack of capacity, etc., to exercise a high degree of care for his safety and to exercise care to ascertain his destination and object in boarding the train and to prevent his alighting therefrom while the train was in motion; that appellant, well knowing the premises, permitted him to ride on the

platform of one of the cars, his whereabouts on the train being unknown to appellant, its servants and agents, which, in the exercise of ordinary care should have been known, and took no precautions to prevent him from riding on the platform or jumping from the train, etc. The count concludes with a description of the manner of the accident, as do the first two counts.

It is averred in the declaration that the deceased left surviving Charles and Sarah Hoffman, his father and mother, Mabel and Sarah Hoffman, his sisters, and Wilbur Hoffman, his brother.

November 24, 1893, suit was commenced; June 15, 1898, the third or additional count was filed.

Appellant pleaded the general issue to the whole declaration and a special plea of the statute of limitations to the third count. The court sustained a demurrer to the latter plea.

October 18, 1893, Charles Hoffman, Jr., a boy about eleven years and two months of age, rather small and slender, was sent by his mother to the postoffice from Sixtieth street, Chicago, where his parents then lived, about 11.30 or 11.45 o'clock A. M., with instructions to go thence to the train at Sixty-third street and there take the train to Fifty-ninth street, where his mother was to meet him. Appellant operated suburban trains between Chicago Lawn, or Sixty-third street, to and from its main depot in the city, and one of such trains, running north toward Fifty-ninth street and the main depot, was due at the Sixty-third street station about 12 o'clock noon. A pay train, which the evidence tends to show, was a few minutes ahead of the regular suburban train, arrived at the Sixty-third street station about noon. The exact time when it arrived, and the exact time when the suburban train was due, do not appear from the evidence. The pay train consisted of an engine, a baggage car next the engine and a pay car in the rear. The baggage car was a supply car, and contained material for distribution to agents along the line of the road. It had two side doors and a door at each end. The

platform of the baggage car was uninclosed, and there were steps leading up to it. The pay car had a single door at the front end and a double door at the rear end, through one of which the employes entered to get their wages, and through the other of which they passed out. At the front end of the pay car there were gates, and there were no steps by which to ascend to the front platform of the car. Woods, the brakeman, testified that he could not mount to that platform from the ground. The pay train started from Port Huron. There were no seats or other conveniences for passengers on the train; there was a peremptory order of appellant not to receive passengers on it, and the evidence is that, prior to the time of the accident, no passenger rode on it. The crew of the train consisted of John Busley, conductor, who died in the fall of 1895, before the trial, John Tighe, engineer, and Elmer E. Woods, brakeman. The braking was done from the engine by air brakes. The persons on the train, in addition to the crew, were Frank J. Thomas, the paymaster, and his assistant, and James Lietch, the supply man who dealt out the supplies. The Sixty-third street station is on the east side of the track. The train stopped there about two minutes. When it stopped supplies were unloaded by Woods, the brakeman, from the east door of the baggage car, and by him set up beside the station. Woods testified that he and the conductor rode on the rear platform of the pay car, and that during the time the train stopped at the station, the conductor remained on that platform, and was on it when the train started from the station. There was a number of people at the station, and they crowded forward as if to take the train, when the conductor and the witness, Woods, called out that it was not the train. Woods testified:

"I heard Mr. Burley say to stand back, that this was the pay car. The dummy was following and I was carrying supplies and there was a crowd around there and I asked them to stand back. I says: 'Get out of the way here; this is the pay car.'"

That notice was given that the train was not the regular

suburban train appears also from the evidence of two of appellee's witnesses, Mercelon E. Black and his wife. The former testified :

"A little boy, in front of my wife, got up onto the platform first, then my wife swung up onto the first step and I had hold of the car to swing up behind her, when some one says, 'Here comes the regular train.' I afterward learned the boy was Mr. Hoffman's son."

Mrs. Black testified :

"I got off the train because some one in the crowd yelled, 'That is not the train,' and I began to think by that time it was not, myself. There was a kind of appearance that it was not the train."

Mr. and Mrs. Black testified that the boy got on the platform of the rear or pay car, which would seem to have been impossible, in view of the uncontracted evidence of Woods, that that platform was inclosed and without steps. The boy might have got onto the rear platform of the baggage car, which was connected, as cars usually are, with the rear or pay car, and then passed from there to the front platform of the pay car. The platforms being so close together the witnesses, in the excitement of the moment, might easily have been mistaken. No one got on the train except the crew, the paymaster, his assistant, the supply man and the intestate. Woods testified that when the train started from the station he and the conductor were on the rear platform of the pay car. The evidence is that the clerks of the paymaster rode in the back end of the pay car. Woods, the brakeman, testified that he didn't see the boy get on or off the train; that he didn't notice a boy on the train at any time. Tighe, the engineer, testified that he did not see a boy on the train, nor did he see him jump off; that he did not know of the accident until about two hours after it happened. This witness also testified that the train was running about ten minutes ahead of the suburban train by his watch. Lietch, the supply man, and Thomas, the paymaster, both testified that they saw no boy on the train. If the conductor rode on the rear platform of the pay car from Sixty-Third street, a distance of about

a mile, and the boy was on the front platform of the rear or pay car, the front door of which car was, as the evidence shows, kept locked, it seems improbable, at least, that the conductor saw the boy between Sixty-third and Fifty-Ninth streets. Mrs. Black, appellee's witness, who started to get on the train but desisted when she heard some one yell, "That it is not the train," testified that as she got on the step a man stepped off the rear platform of the front car right in front of her, went hurriedly to the depot for a moment and then back to the car; that when the train started this man was on the rear platform of the front car from three to five feet distant from the boy who she says was on the front platform of the rear car, that she didn't remember seeing him look toward the boy. She says he was a small man of dark complexion, wore a cap, and looked as does a brakeman or conductor.

William C. Craven, witness for appellee, testified that he saw the deceased on the front platform of the rear car before the train started; that he, the witness, was from fifteen to twenty feet distant from the boy; that he also saw, before the train started, a man at the rear door of the front car, from four to five feet from where the boy was; that the man was looking toward the rear as the train started, facing the boy; that he was so dressed "that I took him to be a brakeman, the conductor of the train." The evidence of Wood, the brakeman, as to how he was occupied while the train stood at the station; that the conductor during that time, remained on the rear platform of the rear car, and that both he and the conductor were on that platform when the train started from the station, is inconsistent with the hypothesis that the person seen by Mrs. Black and Craven was either the conductor or the brakeman. Their testimony is reconcilable with that of Woods only on the hypothesis that the person seen by them was the paymaster or his assistant, the supply man, or his clerk, none of whom had anything to do with the operation of the train.

Mrs. Hoffman testified that she was waiting for the de-

ceased at the Fifty-ninth street station; that the train passed that station "at a pretty good speed;" that as it passed she and the deceased recognized and smiled at each other. She testified: "The boy was standing, when I saw him, between the two coaches. I am not positive whether he was on the rear platform of the front car, or on the front platform of the rear car. I am sure he was on the steps." She says that he had hold of the railing at the side of the train. The Fifty-ninth street station is west of the tracks, and the boy was on the west steps. Mrs. Hoffman testified that there was no one else on the platform where the boy was, and that she did not think any of the train men saw him when he was about to jump. When the train passed a little north of the Fifty-ninth street station, the deceased jumped from it and was killed. His mother testified: "I thought he struck the journal box of the car." The intestate had no ticket when he boarded the train at Sixty-third street. His mother testified that she had a twenty-five ride family ticket with her at Fifty-ninth street, and the claim of counsel for appellee is, apparently, that Mrs. Hoffman intended to pay the boy's fare at the Fifty-ninth street station.

It is plain from the evidence that the intestate was not received on the train as a passenger. He had no ticket and no means of paying his fare, and had there been a station between Sixty-third and Fifty-ninth streets, and the conductor, before reaching such station, had learned that the intestate was on the train, he would not only have been justified in removing him therefrom at such intermediate station, but, under appellant's peremptory order, it would have been his duty so to do. The relation of carrier and passenger not existing, the appellant did not owe to the deceased the duty arising from that relation. The evidence shows clearly and without contradiction, that persons at the Sixty-third street station, who desired to take a north-bound train, and who, by mistake, were about to take the pay train, were notified that it was not the suburban train, and that thereupon, they all, with the exception of the intestate, desisted from

attempting to take the train. We are of opinion that the evidence preponderates in support of the proposition that none of the crew operating the train knew that the intestate was on it, and the distance from Sixty-third street to Fifty-ninth street being only about a mile, the train being a pay train on which passengers were not received or permitted, and persons at the Sixty-third street station having been notified of that fact, the front door of the rear car being locked, the front platform of that car inclosed by gates and without steps, we think it can not reasonably be held that the conductor, or any of the train crew, was guilty of want of ordinary care in not passing through the train between Sixty-third and Fifty-ninth streets, for the purpose of ascertaining whether any one was wrongfully on the train. The proposition, however, on which appellant's counsel mainly relies is, that even assuming that appellee's intestate was riding on the platform by reason of the want of ordinary care of the trainmen, it was not a natural or probable consequence of his being there, or which might reasonably have been anticipated, that he would jump from the train after it passed the Fifty-ninth street station, and while it was in motion; that his so jumping from the train was in no degree attributable to any want of ordinary care on the part of appellant's employes, but was his voluntary act, independent of any negligence attributable to appellant, and was sufficient of itself to cause the accident, and which did cause it, and that it was the proximate cause of the accident. In *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, the court (p. 261) say :

“An intervening efficient cause is a new and independent force, which breaks the causal connection between the original wrong and the injury, and, itself, becomes the direct and immediate, that is, the proximate cause of an injury. (Bishop on Non-Contract Law, Secs. 42, 835, 836.) And the test is, was it a new and independent force, acting in and of itself in causing the injury, and superseding the original wrong complained of, so as to make it remote in the chain of causation.”

In *Swift & Co. v. Rukowski*, 67 Ill. App. 209, this court said :

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"The proximate cause of an event is that cause which, in natural and continuous sequence, without interference of an efficient, independent, intervening cause, produces the result."

In *Railway Co. v. Kellogg*, 94 U. S. 469, the court said :

"But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." *Ib.* 475.

The Supreme Court of this State has so held. In *Braun v. Craven*, 175 Ill. 401, the court say :

"The principle is, damages which are recoverable for negligence must be such as are the natural and reasonable results of defendant's acts, and the consequences must be such as, in the ordinary course of things, would flow from the acts, and could be reasonably anticipated as a result thereof. Proximate damages are such as are the ordinary and natural results of the omission or commission of acts of negligence, and such as are usual and might have been reasonably expected."

Counsel for appellee insist that, on account of the tender age and limited intelligence and discretion of appellee's intestate, it might reasonably have been anticipated that he might attempt to jump from the train while it was in motion. There is no direct affirmative evidence in regard to the boy's intelligence. We know nothing of his mental capacity or discretion, except such as may be inferred from the facts that he was about eleven years and two months old, rather small, and that his mother trusted him to go alone to the railroad station and there take the train. In *Railway Co. v. Eininger*, 114 Ill. 83, the court, commenting on an instruction which submitted to the jury the question whether a minor plaintiff was of such tender age, and so immature, that the requisite capacity to exercise proper care was wanting, say :

"It was error to give this instruction. There was no evidence as to the age or capacity or discretion of the

plaintiff introduced, more than that witnesses spoke of him as a little boy. He was, however, present in court at the trial. It appeared that he was of such age, and ability to take care for himself, as to be intrusted by his parents to attend school in a large city, at a considerable distance from home, and to go and return by himself. He was, at the time, on his return from school. There was nothing in the case tending to show that negligence was not imputable to the plaintiff by reason of his incapacity to exercise care, and such a question should not have been submitted, by instruction, to the jury."

In *Cronan v. Railroad Co.*, 49 La. Ann. 63, the plaintiff, a boy of ten years of age, fell from the platform of a street car and was injured. The court say:

"It is urged on us, however, that negligence is not imputable to children of tender age. It is, however, equally true that carelessness in children who are of age sufficient to exercise discretion for the avoidance of injury to themselves, when traveling on street cars, is recognized. *Hutchinson on Carriers*, Sec. 666, *et seq.* The law does not fix this age of discretion. All that we have before us on this branch of the case is, that the parents of the boy deemed him old enough to travel by himself, and the fact he was nearly ten years of age. If, as we hold, he was not exposed to peril, and could have left the car with safety, using ordinary care, we do not think the defendant can be held liable merely and only because of the boy's age. Neither reason nor the authorities exact that the carriers of passengers shall anticipate and guard against injuries which ordinary prudence would avoid, and that prudence, it seems to us, is not dispensed with on the part of a boy placed on the car by his parents, and of that intelligence usual to the age of ten."

In *Hessinger v. Dennie*, 137 Mass. 197, carelessness was imputed to the plaintiff, a boy eight years and nine months old, and it was held that his negligence, waiving the question of the defendant's negligence, precluded recovery. In *Masser v. Railroad Co.*, 68 Ia. 602, it was held that the plaintiff's intestate, who was between eleven and twelve years of age at the time of the injury complained of, was guilty of negligence which precluded recovery, and the court reversed a judgment for the plaintiff, without remanding the cause.

A boy thirteen years and one month old was held guilty

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of negligence which precluded a recovery. *Merryman v. Railway Co.*, 65 Ia. 634. The same was held as to a boy twelve years of age. *Ecliff v. Ry. Co.*, 64 Mich. 196.

In *Brightman v. Union St. Ry.*, 167 Mass. 113, the plaintiff's intestate, a boy about seven years and eleven months old, got on the steps of the rear platform of a street car drawn by horses, while the horses were walking. The driver saw him, but said nothing to him. Afterward, while the horses were trotting, he jumped off the car and suffered injuries which caused his death. The court say:

"The fall of the plaintiff's intestate was not due to his being allowed to remain on the steps of the car. It was caused by his voluntarily jumping off when the car was in motion. It was not a part of the defendant's duty to prevent a passenger from leaving the car while in motion, still less to prevent a trespasser from doing so."

In *Schiffler v. C. & N. W. Ry. Co.*, 96 Wis. 141, the plaintiff, aged about seventeen years, boarded the defendant's train intending to go to Jackson. He was late at the station and for that reason failed to procure a ticket. The conductor received his fare to Jackson and informed him that the train did not stop at Jackson but that its speed would be slackened so that he might alight there. The court held that it was the conductor's duty to run the train according to the published schedule and that his promise to slow up was not binding on the company. The train, however, did slow up somewhat as it reached Jackson. After it passed some distance by the station the plaintiff jumped from it and was injured. The court after holding that the plaintiff was negligent, say:

"Even if this were not so, it is not easy to apprehend how the failure to stop the train could be the proximate cause of the plaintiff's accident. The natural consequence would be that plaintiff would be carried by the station. If this was a binding contract of carriage it would furnish ground for appropriate damages. But that the plaintiff should jump from the train while in rapid motion, was neither a natural nor probable consequence of the failure to stop the train. And so it could not well be anticipated. For that reason it was not the proximate cause of the plaintiff's accident."

In *Hemingway v. Railroad Co.*, 72 Wis. 42, cited by appellee's counsel, the plaintiff, a boy about eleven years of age paid his fare to the conductor and told him he was going to Janesville. Under these circumstances, the court held that the conductor failed in his duty in not informing the plaintiff that the train did not stop at the depot at Janesville, and for this failure of duty the company was held liable for an injury to the boy, by reason of his attempting to get off the train as it slowly passed the depot. It was customary for the train to pass the depot, go beyond a switch, and then back up to the platform of the depot to allow passengers to alight, of which custom the plaintiff was ignorant. We do not regard the decision applicable to the facts in the present case. Our conclusion from the evidence and the law applicable thereto, is that the injury complained of was not the result of any wrongful act, neglect or default of appellant, but was caused by the voluntary act of appellee's intestate in jumping from the train while it was in motion; that the so jumping was the proximate cause of the accident, and that, had appellee's intestate survived the accident, he could not have maintained an action for the alleged injury against appellant. Consequently the appellee can not recover. At the conclusion of all the evidence appellant's counsel moved the court to instruct the jury to find the defendant not guilty, and presented to the court an instruction to be given to that effect. The motion should have been allowed.

We think it unnecessary to pass on other questions discussed by appellant's counsel. The judgment will be reversed.

J. R. Smith and T. C. Wheeler, Assignees of A. Bryan & Co., v. Lamson Bros. & Co.

1. *GARNISHMENT—Upon What Funds it Attaches.*—The amount in the possession of the garnishee at the time of the service of the writ is the amount to which the process attaches, and not that which comes into his possession afterward.

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2. FOREIGN ASSIGNMENT—*Situs of a Debt*.—The domicile of the creditor fixes the *situs* of a debt; but the rule does not permit a foreign assignment to operate to the prejudice of a domestic creditor.

Attachment and Garnishee Process.—Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Judgment against interpleaders on demurrer; appeal by interpleaders. Heard in this court at the October term, 1898. Affirmed. Opinion filed May 22, 1899.

Statement of the Case.—A suit was begun in attachment by appellees, residents of Illinois, against Bryan and Hale, copartners as A. Bryan & Co., residents of Tennessee. The attachment writ was served upon the American Trust and Savings Bank of Chicago, Illinois, as garnishee, at 10:50 o'clock of the morning of June 15, 1896. The garnishee answered that it had on deposit in its bank a balance of \$287.73 of funds of A. Bryan & Co. at the time of the service of the writ, and that on June 16, 1896, it received from A. Bryan & Co. \$750 in currency and checks, from which it realized \$70.40. Appellants filed an interplea, by which they claimed the entire amount of the funds held by the garnishee. They alleged by their interplea that A. Bryan & Co., who were resident and doing business in the State of Tennessee, had at six o'clock of the morning of June 15, 1896, executed a common law deed of assignment to appellants, as assignees, for the benefit of the creditors of A. Bryan & Co., and that by said deed of assignment all the property, including the fund in question, was transferred to appellants. The interplea alleges, in effect, that the \$750 currency and the checks received by the garnishee on June 16th were, at the time of the assignment to appellants, still in transit and within the State of Tennessee.

Appellees demurred to the interplea. The court sustained the demurrer, and appellants, electing to stand by their interplea, the court dismissed the interplea at appellants' costs. From that judgment this appeal is prosecuted.

WILBER, ELDRIDGE & ALDEN, attorneys for appellants.

D. M. KIRTON, attorney for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

The only questions presented are such as arise from the conflict of interests of the domestic attaching creditors and the non-resident assignees. The question as to the \$287.73, which was in the bank of the garnishee when the writ of attachment was served, must be determined in favor of the attaching creditors. *Heyer v. Alexander*, 108 Ill. 385; *Woodward v. Brooks*, 128 Ill. 222; *Juliard v. May*, 130 Ill. 87; *C. F. L. Co. v. Collier*, 148 Ill. 259; *Townsend v. Cox*, 151 Ill. 62.

A further question arises, however, as to the \$750 and the checks received by the garnishee on June 16th, and alleged by the interplea to have been within the State of Tennessee, although in transit to the garnishee when the assignment was made.

It is very strenuously contended by counsel for appellants that the assignment was operative as to such fund, because the fund was still within the State of Tennessee when the assignment was made, even though the courts of Illinois should decline to give effect to the assignment as to the \$278.73, which was within this State when the assignment was made. We can not assent to this contention, for we perceive no good ground for distinguishing as to the different funds. They are all now within the jurisdiction of the court here. The appellants did not reduce these funds, or any part thereof, to possession in the State of Tennessee. We can see no ground for assuming, by any fiction, that possession was acquired. If it might be so assumed, then it might as well be assumed that because the domicile of the creditor fixes the *situs* of a debt, therefore the debt due from the garnishee to A. Bryan & Co. was by fiction of law located in Tennessee, and was through the assignment reduced to the possession of the assignees.

But the rule above referred to, which does not permit a foreign assignment to operate to the prejudice of a domestic creditor, is applied as well to funds, *i. e.*, debts garnisheed, as to any other species of property. *C. F. L. Co. v. Collier*, *supra*.

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The allegations of the interplea, taken as true, show no rights as against appellees, the attaching creditors. The demurrer was properly sustained.

The judgment is affirmed.

Julius Goldzier and John L. Rodgers v. Joseph Poole.

1. **ATTORNEYS—*Liability for Negligence in the Management of Suits.***—In suits against attorneys at law for damages by reason of negligence in the management of the client's litigation, the extent of the damages must be affirmatively shown, for the attorney is only liable for the actual injury which his client has sustained, and not necessarily for the amount of the client's demand.

2. **SAME—*Measure of Damages for Negligence.***—In suits against attorneys for the loss of claims by negligence, in order to recover beyond nominal damages, it must be shown that it was a subsisting debt and that the debtor was solvent.

Action in Case, for negligence in the management of suits. Trial in the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term 1898. Reversed and remanded. Opinion filed May 22, 1899.

Statement of the Case.—Appellee brought this suit against appellants, who are attorneys at law, as an action on the case for damages, alleging that appellants had been retained by him to prosecute a suit for damages against the Bouton Foundry Company, on account of an injury sustained by him by reason of the negligence of that company, and that appellants had negligently permitted said suit to be dismissed, whereby the claim of appellee was lost, etc.

The negligence alleged on the part of appellants is that on the 20th day of April, 1893, when the case was called, "the said defendants then and there negligently failed to appear and respond to said call in behalf of the plaintiff, as it was then and there their duty to do, and in consequence of said failure the said case was then and there dismissed for want of prosecution."

It is further alleged that thereafter and before another suit could be made available, on the 1st of July, 1893, the Bouton Foundry Company became wholly insolvent, so that a judgment could not be collected from it.

Upon the trial the jury returned a verdict of \$2,500 damages against the appellants, on which, after overruling a motion for new trial, and a motion in arrest of judgment, the court rendered the judgment, from which this appeal is prosecuted.

HENRY HIESTAND, attorney for appellants.

In case of negligence the extent, of the damages must be affirmatively shown, for the attorney is only liable for the actual injury his client has received and not necessarily for the nominal amount of the demands for collection. 2 Greenl. Ev., Sec. 146. Accordingly when a debt is alleged to have been lost by the attorney's negligence it must be shown that it was a subsisting debt and that the debtor was solvent. Staples' Ex'r v. Staples, 85 Va. 85; Weeks on Att'ys (2 Ed.), S. 319.

The damages do not necessarily extend to the amount of the debt lost by the attorney's negligence, but only to the loss actually sustained. Eccles v. Stephenson, 3 Bibb. (Ky.) 517; Cox v. Sullivan, 7 Ga. 148.

It must be shown, therefore, not only that the attorney was grossly negligent in proceeding against the maker of the note, but that the amount might have been collected from him had the proper steps been taken. Suydam v. Vance, 2 McLean, 99.

J. D. RILEY, attorney for plaintiff; RUFUS COPE, of counsel, contended that where a client loses his claim by reason of the negligence of his attorney, the burden is on the attorney to show that the claim could not have been collected, citing Moorman v. Wood, 117 Ind. 144.

MR. JUSTICE SEARS delivered the opinion of the court.

But one question is presented which need be considered, viz., as to the burden of proof of solvency or insolvency of

the Bouton Foundry Company, at the time when the suit of appellee against that company was permitted to be dismissed. The declaration alleges that on July 1, 1893, after the dismissal of the suit of appellee, the Bouton Foundry Company became insolvent, and that thereby appellee's claim was lost and appellee was injured. Appellee's suit was dismissed on April 20, 1893. Counsel for appellee contend that the burden of showing insolvency of the company, which would have made the claim of appellee of no value at the time of the dismissal of the suit, is upon appellants; while counsel for appellants contend that it was incumbent upon appellee to show that his claim was of value when his suit was dismissed, *i. e.*, that the company was then solvent. The evidence shows only that on July 15, 1893, the Bouton Foundry Company was an insolvent, of record in the County Court.

In suits against attorneys at law for damages by reason of negligence of the attorney in the management of the client's litigation, it is a general rule that the extent of the damages must be affirmatively shown, for the attorney is only liable for the actual injury which his client has sustained, and not necessarily for the nominal amount of the client's demand. Weeks on Att'ys at Law (1st Ed.), 293; 2 Greenleaf Ev., Secs. 146, 148; *Snydam v. Vance*, 2 McLean, 99; *Cox v. Livingston*, 2 Watts & Serg. 103; *Harter v. Morris*, 18 Ohio St. 493; *Eccles v. Stephenson*, 3 Bibb (Ky.) 517; *Cox v. Sullivan*, 7 Ga. 144.

Hence, when a claim is alleged to have been lost by the attorney's negligence, in order to recover beyond nominal damages, it must be shown that it was a subsisting debt, and that the debtor was solvent. Weeks on Att'ys at Law, 293; *Russell v. Palmer*, 2 Wils. 325, also reported in 2 Comyn on Cont., 3d Am. Ed., p. 252; *Bruce v. Baxter*, 7 B. J. Lea, 477; *Staples v. Staples*, 85 Va. 76; *Pennington v. Yell*, 6 Eng. (Ark.) 212.

There are decisions holding to the contrary, but we think that the weight of authority supports the rule as announced by the citations above. All of the decisions to the contrary

will be found to have been based, either directly or indirectly, upon the authority of *Godfrey v. Jay*, 7 Bing. 412. That case was decided in 1831, and appears to have been altogether based upon the authority of *Marzetti v. Williams*, 1 Barn. & Ad. 415, which was decided in King's Bench in 1830. But in *Marzetti v. Williams* it was only held that the plaintiff was entitled to nominal damages in absence of proof of actual damages.

The authorities cited in *Moorman v. Wood*, 117 Ind. 144, relied upon by appellee, do not support that decision, in so far as it announces the doctrine contended for by counsel for appellee.

In *Collier v. Pullman*, 13 B. J. Lea, 114, the decisions *contra* are distinguished from cases like the one here, where the interest lost by negligence of the attorney is a demand for money or damages, and where the value of the interest lost, and hence the actual injury resulting from the negligence, depends wholly upon the validity of the demand, and the solvency of the one against whom the demand was made.

We do not regard decisions in cases where the attorney is chargeable with fraud (*Jennings v. McConnel*, 17 Ill. 148, and others), as in point or controlling in cases where, as here, the only ground of action is negligence. There being no decision in this State which is applicable to the facts of this case, and the authorities elsewhere being conflicting, we are inclined to adopt that rule as the safer and supported by the better authority, which, permitting a recovery beyond nominal damages only to the extent of the actual injury, makes it the burden of the plaintiff to establish his measure of damages, and to show what the actual injury is, by showing the validity of the demand which he has lost, and the fact that it could in part or in whole have been realized had the attorney not been negligent. The right to nominal damages, upon showing of the breach of duty, can not be questioned, but the right to substantial damages, as are here awarded, should depend upon the extent of the actual injury.

In the case under consideration, the insolvency of the Bouton Foundry Company, against which appellee had a demand, appears of record on July 15, 1893.

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Whether it was in like financial condition, or better, or worse, twelve weeks before, *i. e.*, on April 20th, when the suit was dismissed, can not be determined from the evidence. We think that its then condition should be made to appear in order to entitle appellee to recover substantial damages against appellants.

If no presumption of solvency to meet contractual obligations obtains, sufficient to entitle to substantial damages in this class of cases, as seems to have been held by the authorities above cited, then it is certain that it can not be presumed that this corporation, insolvent in July, 1893, was able to respond to a demand for \$2,500 damages in April, 1893.

The judgment is reversed and the cause remanded.

Jacob Schaefer v. North Chicago St. R. R. Co.

1. CONTRIBUTORY NEGLIGENCE—*In Actions for Trespass and Willful Wrongs.*—In an action for trespass and for a willful wrong, the question of contributory negligence does not arise.

2. SAME—*No Application, When.*—Where the declaration is in case, and the wrong charged as a willful and wanton wrong, the doctrine of contributory negligence of the plaintiff has no application.

3. PASSENGERS—*Duty to Submit to the Orders of the Conductor.*—It is the duty of a passenger to submit to the order of a conductor to leave the car, although such order is unwarranted, and to look to the carrier for damages for the injury sustained. If he refuses to obey and invites a conflict in the enforcement of the conductor's order, he can not recover against the carrier for injuries received through such conflict, unless the expulsion is done in a wanton manner.

Assault and Battery.—Trial in the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Verdict and judgment for defendant; appeal by plaintiff. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed May 22, 1899.

Statement of the Case.—Appellant brought this suit against appellee to recover for injuries sustained by appellant through an assault alleged to have been committed by

appellee, through its agent, a conductor, while appellant was a passenger upon one of the cars of appellee.

The declaration in each count complains, for that the defendant, by its servants, agents and employes did, with force and arms, assault the plaintiff. Upon the trial evidence was introduced which tended to show that appellant was intoxicated; that he persisted in putting his feet upon a seat of the car, contrary to the request of the conductor; that the conductor ordered him to leave the car; that he refused; and that the conductor then forcibly ejected him from the car. There was also some evidence tending to show that the car was in motion and had not fully stopped when the conductor put appellant from the car, and that it was while he was thus being put from the car that he was injured.

Upon the trial the court gave to the jury, at the request of appellee, instructions which, in effect, told the jury that if appellant had been guilty of negligence which contributed to his injury, then he could not recover.

The jury found the issues for the appellee. From judgment upon that verdict this appeal is prosecuted.

MORAN, KRAUS & MAYER, attorneys for appellant.

Contributory negligence can not be relied on in any case where the action of the defendant is wanton, willful or reckless in the premises, and injury ensues as the result. * * * Although the plaintiff is guilty of negligence, he can recover if the defendant could have avoided committing the injury by the exercise of ordinary care.

Contributory negligence on the part of the plaintiff is no excuse for wanton and willful negligence on the part of the defendant. *Lake Shore & M. S. R. R. Co. v. Bodemer*, 139 Ill. 596.

This is an action for assault and battery and not for negligence. In the former it is not necessary either to allege or to approve due care on the part of the plaintiff; in the latter it is. It is not necessary to allege or prove due care even in an action for willful negligence. *Lake Shore &*

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Mich. So. R. R. Co. v. Bodemer, 139 Ill. 596, 607, 612; E. St. L. C. Ry Co. v. Jenks, 54 Ill. App. 91, 94; C., M. & St. P. Ry. Co. v. Doherty, 53 Ill. App. 282; 2 Amer. & Eng. Ency. (2d Ed.), page 988, note; Steinmetz v. Kelly, 72 Ind. 442; Talmage v. Smith, 101 Mich. 370; Ruter v. Foy, 46 Ia. 132; Kain v. Larkin, 56 Hun, 79.

JAMES W. DUNCAN and MARCUS KAVANAGH, attorneys for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

It is conceded by counsel for appellee that the instructions as to contributory negligence upon the part of appellant are erroneous. Upon the declaration and the facts here, no question of contributory negligence is involved. The action is not for negligence, but is in trespass and for a willful wrong. Hence the question of contributory negligence does not arise. C., M. & St. P. Ry. Co. v. Doherty, 53 Ill. App. 282.

And if the declaration had been in case, yet the wrong charged being a willful and wanton wrong, the doctrine of contributory negligence of the plaintiff would have no application. L. S. & M. S. R. R. Co. v. Bodemer, 139 Ill. 596.

But counsel for appellee argue that, although the instructions were erroneous, yet this should not work a reversal, because, it is claimed, the verdict could not have been different upon the facts. In other words, it is contended, in effect, that upon the facts presented, there was nothing to submit to a jury. We can not assent to this contention. It is true that it is the duty of a passenger to submit to the order of a conductor to leave the car, even although such order is unwarranted, and to then look to the carrier for damages for such injury as is thereby sustained. And if the passenger refuses to obey and invites a conflict in the enforcement of the conductor's order, he can not recover against the carrier for injuries received through such conflict, unless the expulsion is done in a wanton manner. C., B. & Q. R. R. Co. v. Griffin, 68 Ill.

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499; Penn. R. R. Co. v. Connell, 112 Ill. 295; C. & N. W. Ry. Co. v. Bannerman, 15 Ill. App. 100; C., B. & Q. R. R. Co. v. Wilson, 23 Ill. App. 63; C., R. I. & P. Ry. Co. v. Brisbane, 24 Ill. App. 463; N. C. St. R. R. Co. v. Olds, 40 Ill. App. 421.

But the difficulty in the contention of appellee is, that there is some evidence in this case tending to show that appellant, after refusing to obey the directions of the conductor, and having refused to leave the car, was expelled from the car while it was still moving, and thereby injured. If this evidence was credited by the jury and could be said to create a preponderance of the evidence in that behalf, then the jury might be warranted in finding that the expulsion was effected in a wanton manner.

We are of opinion that it was proper that the evidence should be submitted to the jury. For the error in the instructions indicated, the judgment is reversed and the cause is remanded.

82 476
183 70

Standard Oil Co. v. The Estate of Charlotte E. Holmes, deceased.

1. FOREIGN CORPORATIONS—*Objection to Suing in this State.*—The objection that a foreign corporation can not maintain a suit in the courts of this State until it has complied with the provisions of an act approved May 26, 1897, in relation to foreign corporations doing business in this State, must be made in the trial court. It can not be made in the Appellate Court for the first time.

2. SURETIES—*Liability in Excess of the Penalty in the Bond—Interest.*—Whether a surety at the time of his default can be held beyond the penalty of his bond, is a question involving the interpretation and effect of his contract. Whether interest can be computed after his default, when the effect will be thus to increase his liability, is a question of compensation for the breach of his contract. The American authorities very generally, if not uniformly, maintain the doctrine that at law, in action on a penal bond, interest may be recovered in the form of damages to an extent exceeding the penalty of the bond.

Claim in Probate.—Trial in the Circuit Court of Cook County; the Hon. GEORGE W. BROWN, Judge, presiding. Finding and judgment

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for defendant; appeal by claimant. Heard in this court at the October term, 1898. Reversed and remanded with directions. Opinion filed May 22, 1899.

Statement.—This is an appeal from a judgment of the Circuit Court, disallowing a claim of appellant against the estate of Charlotte E. Holmes, deceased. The cause was appealed from the Probate Court to the Circuit Court, and was tried in the latter court by the court, without a jury, by agreement of the parties. The case was heard partly on an agreed statement of facts signed by the attorneys of the parties. The facts so agreed on are substantially as follows:

July 31, 1891, Charlotte E. Holmes, since deceased, and John Holmes, her husband, executed to Alfred D. Eddy a bond in the penalty of \$1,000, conditioned as follows:

“The condition of the above obligation is such, That, Whereas, The said Alfred D. Eddy is about purchasing from said obligors the north one hundred and eighty-six and three-tenths (186 3-10) feet, of the west ninety-eight and thirty-three hundredths (98 33-100) feet of that part lying east of the railroad, of lot number seven (7) in School Trustees’ subdivision of section number sixteen (16), township thirty-eight (38) north, range number fourteen (14) east of the third principal meridian, in Cook county, Illinois.

And whereas, the city of Chicago has commenced condemnation proceedings for the opening of a street through said lot number seven (7) in School Trustees’ subdivision of section number sixteen (16) aforesaid,

Now, therefore, if the said John Holmes and Charlotte E. Holmes, his wife, shall and do pay all of the assessments, liens, judgments and demands of every kind and nature, that may at any time be levied or come against said premises, so as aforesaid purchased or to be purchased by said Alfred D. Eddy, by reason of the opening of said proposed street, and shall pay all judgments, costs, charges, damages or expenses whatsoever which may hereafter happen or come to or against said premises, by the reason of the opening of the said street, then this obligation to be void; otherwise to remain in full force and effect.”

August 1, 1891, the said obligors, being then the joint owners in fee of said described premises, conveyed the same,

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by warranty deed, to Alfred D. Eddy. Eddy purchased said premises as the agent of appellant and for appellant, and November 22, 1891, he conveyed the premises and assigned the bond to appellant. The consideration for the conveyance to Eddy was \$6,520.50, which amount was paid by him in cash, the money so paid being appellant's. The title was taken in Eddy's name merely for convenience. June 5, 1891, in pursuance of an ordinance passed by the city council of the city of Chicago, a condemnation proceeding, being the same mentioned in the above quoted condition of the bond, was commenced in the Circuit Court of Cook County for the opening of Armour avenue from Fifty-eighth street to Fifty-ninth street, which proceeding was, subsequent to February 25, 1892, dismissed, by reason of the repeal at the last mentioned date of the ordinance authorizing the same.

July 14, 1893, another ordinance was passed by said city council for the opening of Armour avenue from Fifty-eighth street to Fifty-ninth street; a petition was filed in the Circuit Court October 11, 1892, for the ascertainment of the cost of the improvement, and such proceedings were had that the damages or compensation to be paid for opening said Armour avenue between said streets was assessed by a jury at \$14,771.55. Commissioners were appointed by the court to make a special assessment to pay said damages or compensation, and a special assessment was made by them accordingly, which included an assessment of \$3,700 on the premises above described, which special assessment was duly confirmed. November 22, 1895, appellant paid to the county collector of Cook county \$2,640.18, being in full for said said special assessment, and costs amounting to eighteen cents, less the sum of \$1,060, which was accorded to appellants as compensation for the opening of said Armour avenue through said premises, and obtained from the said collector a receipt in full for \$3,700, the amount of the special assessment against said premises. John and Charlotte E. Holmes had notice of said assessment and failed to pay the same, and appellant was compelled to pay the same, and

neither Charlotte E. Holmes, nor her husband, nor any one, has repaid said special assessment or any part thereof to appellant. The estate of Charlotte E. Holmes is being administered in the Probate Court, and the claim of appellant was duly filed in said court.

Alfred D. Eddy testified :

"My name is Alfred D. Eddy; I am counsel for Standard Oil Company, claimant in this matter. I was familiar with the location of the property described in the deed from Charlotte E. Holmes and her husband and William Brooker at the time the conveyance was made. When I purchased this property it was inaccessible from any street whatever, and the opening of Armour avenue from Fifty-eighth to Fifty-ninth streets would have made it accessible; and it was in view of that that I purchased it. There was no communication to the property along the line of the Rock Island railroad. I purchased the intervening property, between the property purchased of Holmes and Fifty-eighth street, about the same time, and purchased it the same as I did this, for the Standard Oil Company."

ALFRED D. EDDY, attorney for appellant, as to the question of the right to recover interest on the amount of the bond, which whole amount matured at the date of the payment of the assessment by the claimant, as said payment exceeded the amount of the penalty of the bond, submitted the following authorities: *Star & Curtis' An. St.*, Chap. 74, Par. 2; *Cassady v. School Trustees*, 105 Ill. 560; *Perit v. Wallis*, 2 Dallas, 252; Book 1, L. R. Ed., U. S. Sup. Ct. Rep. 370.

A. D. ADKINSON, attorney for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

The validity of the special assessment levied against the premises conveyed by Charlotte E. Holmes and her husband to Alfred D. Eddy, and by Eddy to the appellant, is not questioned. Counsel for appellee objects that appellant is a foreign corporation, and can not maintain the suit

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until it has complied with the provisions of an act approved May 26, 1897, in relation to foreign corporations doing business in this State, citing section three of the act. Bradwell's Laws of Ill., 1897, p. 133. It does not appear from the record that this objection was made in the trial court, and can not be made here for the first time. The same counsel objects that it does not appear from the agreed statement of facts, that the streets ordered opened by the ordinance of July 14, 1893, is the same street ordered open by the ordinance of June 5, 1891, and referred to in the conditions of the bond. This objection was made by counsel for appellee in the trial court, but no ruling on the objection was made by the court. The objection can not be sustained. It is recited in the conditional part of the bond that "The city of Chicago has commenced condemnation proceedings for the opening of a street through said lot seven (7) in School Trustees' subdivision of section number sixteen (16) aforesaid." It is recited in the agreed statement of facts, "That on June 5, 1891, a condemnation proceeding was commenced in the Circuit Court of Cook County, Illinois (being Docket No. 92,008), pursuant to an ordinance theretofore enacted by the city council of Chicago, for the purpose of opening Armour avenue from Fifty-eighth street to Fifty-ninth street in said city, the same being the condemnation proceedings mentioned in the said bond executed by said Charlotte E. Holmes and John Holmes, on the said 31st day of July, 1891, as having been then commenced." * * * "That afterward, to wit, on the 14th day of July, 1893, another ordinance was passed by the said council of the city of Chicago, ordering said Armour avenue to be opened from Fifty-eighth street to Fifty-ninth street in front of said real estate, and on October 11, 1893, a petition for the ascertainment of the cost of opening said Armour avenue from Fifty-eighth to Fifty-ninth streets was filed in the Circuit Court of Cook County, Illinois (being docket No. 121,760), pursuant to said ordinance."

A plat attached to the stipulation of facts, referred to in the stipulation and made a part of it, shows that Armour

avenue, as ordered opened by the ordinance of July 14, 1893, is opened or extended through lot seven, and it appears from the stipulation of facts that the sum of \$1,060 was awarded to appellant in the condemnation proceeding instituted in pursuance of the ordinance of July 14, 1892, as compensation for the opening of Armour avenue. Counsel for appellee, in his argument, substantially admits that this compensation was for part of appellant's premises taken for the street, saying: "This is an attempt to make this estate pay the claimant for its own property taken for a street." If part of appellant's property in lot seven was so taken, then the street was opened through lot seven. There is absolutely nothing in the objection. But appellee's counsel contend that the liability of the obligors in the bond to pay an assessment for the opening of the street, is limited by the conditions of the bond to an assessment made in the condemnation proceeding referred to in the conditions, and pending at the time of the execution of the bond, and that those proceedings having been dismissed, by reason of the repeal of the ordinance authorizing them, there is no liability. In support of this contention counsel cite: *In re Estate of Charlotte E. Holmes*, 79 Ill. App. 59, affirmed 179 Ill. 275. In that case the condition of the bond was essentially different from the condition of the bond in the present case. Consequently the decision in that case is inapplicable to the present case. The condition of the bond in question is to pay "all the assessments, liens, judgments and demands of every kind and nature that may, at any time, be levied or come against said premises so as aforesaid purchased by said Alfred D. Eddy, by reason of the opening of said proposed street," etc. Language more appropriate to include any and all assessments for the opening of the proposed street, whether pending at the date of the execution of the bond or thereafter to be levied, can not easily be conceived. The language is so plain that no room is left for construction. In the agreed statement of facts it is admitted that Charlotte E. Holmes and her husband had notice of the assessment and failed to

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pay it, and that appellant "was compelled to pay and did pay the said special assessment."

It is further admitted that in the proceedings in which the assessment was levied, the court had jurisdiction of the person of Charlotte E. Holmes and of all owners of the premises in question, so that Charlotte E. Holmes and her husband were bound to know when the assessment was payable. That it was payable before November 22, 1895, when appellant paid it, is evidenced by the fact, admitted by the stipulation, that appellant made payment to the county collector, which could only be after the premises had been returned to him as delinquent by the city collector. 1 S. & C.'s Stat., C. 24, par. 151-156.

Under these circumstances appellee's counsel claims that the special assessment which the obligors undertook to pay being largely in excess of the penalty of the bond, appellant is entitled to judgment for the penalty, with interest thereon from November 22, 1895, the date of payment by appellant. This claim is supported by the preponderance of American authority. *Lyon v. Clark*, 8 N. Y. 148; *Brainard v. Jones*, 18 Ib. (4 Smith) 35; *Robbins v. Long*, 16 N. J. Eq. 59; *Gloucester City v. Eschbach*, 54 N. J. L. 150; *Wyman v. Robinson*, 73 Me. 384; *Burchfield v. Haffey*, 34 Kan. 42; *Sedgwick on Measure of Damages*, 8th Ed., Vol. 2, Secs. 678, 679; 2 *Sutherland on Damages*, pp. 14-15, and authorities cited p. 15, n. 1.

In *Lyon v. Clark*, *supra*, the bond was to indemnify the obligees against the payment of money, and the court say:

"The apparent conflict in the cases, on the question whether a plaintiff can recover, in debt on a penal bond, a sum beyond the penalty, grows out of confounding actions on bonds for the performance of covenants, properly so called, with actions on bonds for the recovery of money only. In the former case, the recovery is, in general if not always, limited by the penalty, and in the latter it is not," etc.

Commenting on a like bond, the court, in *Brainard v. Jones*, *supra*, say:

"The rule has often been laid down in general terms, that

sureties are not liable beyond the penalty of the bond in which their obligation is contained. But on a careful examination of the reason and justice of the rule, it will be found inapplicable to a question of interest accruing after they are in default for not paying according to the condition of the bond. There is a plain distinction which has sometimes been lost sight of, and consequently some confusion and contradiction will be found in the cases on the subject. Whether a surety, at the time of his default, can be held beyond the penalty of his bond, is a question of the interpretation and effect of his contract. Whether interest can be computed after his default, when the effect will be thus to increase his liability, is a question of compensation for the breach of his contract."

The defendants in the case were sureties, the damages exceeded the penalty, and the court held the plaintiff was entitled to recover the penalty with interest thereon from the time of the breach.

In *Robbins v. Long*, *supra*, which was a bill in equity, a recovery was had for the penalty of a bond, with interest. The court say: "The American authorities very generally, if not uniformly, maintain the doctrine that at law, in an action on a penal bond, interest may be recovered in the form of damages to an amount exceeding the penalty of the bond," citing numerous cases.

In *Hoxsey v. Patterson*, 59 Ill. 522, the penalty of the bond was \$3,602.55, and the condition was for the payment of that sum to the obligees, one-third in six, and the balance in twelve months from the date of the bond. The court held that the plaintiffs were entitled to recover the penalty with interest thereon from the time of breach. The difference between that case and the present is, that in the former the condition was to pay up an ascertained amount, while in the latter it is to pay an amount to be thereafter ascertained. This difference does not, as we think, distinguish the cases in principle.

Section 20 of the practice act relates only to penal bonds, conditioned for the performance of covenants, and has no application to bonds, like the one in question, conditioned for the payment of money. There is a clear distinction

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between the two classes of bonds. Sutherland on Damages, Vol. 2, p. 14; Sedgwick on Damages, Vol. 2, Sec. 679; Lyon v. Clark, 8. N. Y. 152.

The judgment will be reversed, with directions to the Circuit Court to enter judgment in favor of appellant for the sum of \$1,000, with interest thereon at the rate of five per cent per annum from November 22, 1895, till the entry of judgment, to be paid in due course of administration as a claim in class seventh. Reversed and remanded with directions.

Hide and Leather National Bank v. Josephine P. Alexander.

82	484
s184	s416
82	484
d98	1402
82	484
d100	*239

1. **PROMISSORY NOTES**—*Unlawful Sale of, by an Agent—Burden of Proof.*—Where a person purchased a promissory note from an agent who had wrongfully converted the same to his own use, the burden is upon him to show, in a suit against him by the lawful owner, that he acquired it without notice that the agent had no authority to dispose of the note or that the plaintiff was the owner.

2. **FRAUD**—*Where One of Two Innocent Parties Must Suffer.*—Where one of two innocent parties must suffer a loss by the fraudulent acts of a third person, the loss must fall upon the one who has been the most instrumental in enabling such third person to perpetrate the fraud.

Trover, for promissory note. Trial in the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding. Finding and judgment for plaintiff. Appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed May 8, 1899.

Statement of the Case.—Appellee purchased the note in question in this case of \$10,000, made by one Schmid, dated June 15, 1892, payable to his order five years after its date, bearing interest at six per cent per annum, indorsed in blank by him, and secured by trust deed to Theodore H. Schintz, the principal and interest being payable at his office, paying therefor \$10,000. From June 15, 1892, until in June, 1897, but on what day of the month does not appear, appellee kept the note and trust deed in her pos-

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session, when she took and delivered them to Schintz to have them renewed; that is, for Schintz to get another note and trust deed in place from Schmid. She did not authorize him to sell, pledge or otherwise dispose of the note.

Instead of getting the note renewed and returning it to appellee, Schintz procured an extension agreement of the same, to be executed by Schmid and wife, bearing date June 15, 1897, for three years from that time, subject to the payment of interest at six per cent per annum, as evidenced by six interest notes of \$300. Each of these interest notes was made by Schmid, payable to his own order at the office of Schintz, and indorsed in blank by Schmid.

On June 15, 1897, or within two, three or four days thereafter, Schintz took the original note of \$10,000 with the extension agreement attached thereto by brass eyelets and the interest notes to the appellant bank and substituted them for other collaterals belonging to him and held by the bank as security for his indebtedness to the bank of \$25,000. The vice-president of the bank, who did the business in person, testified that the notes were taken from Schintz in the ordinary course of business and full value paid therefor. There is no evidence that the appellant did not know that Schintz was merely appellee's agent and not the owner of the notes and not authorized to hypothecate them. After appellee discovered Schintz's fraud in hypothecating the notes she made demand for their return by the bank, which was refused, and she then brought this suit in trover for a conversion of the original note. A trial before the court without a jury resulted in a finding and judgment for appellee of \$10,480, from which this appeal is taken.

GEORGE N. STONE, attorney for appellant.

Possession is *prima facie* evidence of property in negotiable paper, payable to bearer or indorsed in blank; and such *bona fide* holder can recover, though it came to him from a person who had stolen it from the true owner, provided he took it innocently in the course of trade, for a

valuable consideration, and under circumstances of due caution; and he need not account for it unless suspicion be raised. *Bush v. Peckard*, 3 Harr. (Del.) 388.

Between the original parties, the consideration may always be gone into. The rule equally applies when the indorsee took the paper with knowledge or notice of the illegal consideration, or the want or failure of consideration, or any circumstance which would have avoided the note in the hands of the indorsee; or when not taken in the course of trade, or after it was due, or under circumstances which ought to have led to an inquiry. *Chitty App.* 798.

Negotiable paper can be assigned or transferred by an agent or any other person fraudulently, so as to bind the true owner as against the holder, if taken in the usual course of trade, and for a fair and valuable consideration, without notice of the fraud. *Bay v. Coddington*, 5 Johns. Ch. 56; 3 Kent's Com. 81.

The maker or indorser who places it (note) in the hands of another for the purpose of being used in a particular way or for a special object, takes the risk of its being used in a different way, and can not refuse to pay it to any *bona fide* holder into whose hands it may come. *Fering v. Clark*, 16 Gray (Mass.), 74.

That a party taking from the agent of a payee a note indorsed in blank before maturity, in good faith, as a collateral security, for the debt of a third person, is not affected by fraud of agent in disposing of same. *Paulette v. Brown*, 40 Mo. 52; see also *Gillham v. State Bank*, 2 Scam. 246; *Depuy v. Schuyler*, 45 Ill. 306; *Woodworth v. Huntoon*, 40 Ill. 131; *Farber v. National Forge & Iron Co.*, 50 Ill. App. 503; *McHenry v. Ridgely*, 2 Scam. 309; *Curtiss v. Martin*, 20 Ill. 557.

LACKNER, BUTZ & MILLER, attorneys for appellee.

When it has been shown that a negotiable instrument was stolen from or lost by the true owner, tainted in its inception with illegality or fraud, obtained from the maker by fraud or duress, or put into circulation fraudulently, the

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presumptions in favor of the holder's title are overcome and it devolves upon him to show that he is a *bona fide* holder for value; that is, he must show that he or some prior holder took the paper in good faith, for value, without notice, before maturity, and in the usual course of business. Am. & Eng. Enc. of Law, Vol. 4, page 321 (2d. Ed.); Hodson v. Eugene Glass Co., 156 Ill. 397; Charles v. Remick, 156 Ill. 327; Berry v. Alderman, 14 C. B. 95.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

The question presented for decision is, which of the two, appellant or appellee, both claiming to be innocent persons and without fault, respectively, shall be the sufferer for Schintz's fraud. Neither is a party to the note.

Appellant claims to be an innocent purchaser before maturity, in the ordinary course of business, for value, from a person in the manual possession of the note, and, as far as appeared by the note itself, the actual owner thereof, and cites many authorities in support of its contention. This might avail appellant were it not for the fact that it is uncontroverted that Schintz had no authority whatever to sell, pledge, or otherwise dispose of the note. He took it for a specific purpose to procure its renewal, had no title whatever, and its hypothecation with appellant was wholly without authority from appellee, and fraudulent. This being the situation, the burden was on appellant to show it had no notice that Schintz was only the agent of appellee, and without authority to dispose of the note, and that she was the owner of the note. Appellant failed to make this proof, and its contention in this respect must fall. Appellant's authorities are not applicable. 4 Am. & Eng. Ency. of Law (2d Ed.), 321, and cases cited; Hudson v. Eugene Glass Co., 156 Ill. 397; Charles v. Remick, Id. 327; Wright v. Brosseau, 73 Ill. 381, and cases cited.

This being so, it becomes unimportant to discuss the question argued by counsel, as to whether, the original note being received by the bank on the 15th day of June, 1897,

or two, three or four days thereafter, it was not matured paper if received on the day of its maturity, or if it was received thereafter, the extension agreement had the effect of making it unmatured paper.

This state of the proof also makes it unnecessary to consider appellant's contention that appellee is estopped by her carelessness in putting the note in Schintz's hands without filling out the blank indorsement.

The judgment is therefore affirmed.

Chicago and E. I. R. R. Co. v. Robert Hines.

82	488
92	1223
82	488
95	340

1. **NEGLIGENCE—Joint, of Two Defendants.**—The fact that an injury to plaintiff was occasioned by the combined negligence of a railroad company and a street car company can not avail the railroad company in a suit for damages.

2. **ORDINANCES—Enacting Clause Not Essential.**—An ordaining or enacting clause is not essential to the validity of an ordinance, even though prescribed by the municipal charter.

3. **MUNICIPAL LAW—Defined.**—Blackstone defines municipal law as "A rule of civil conduct prescribed by the supreme power in a State, commanding what is right, and prohibiting what is wrong."

4. **SAME—Statutory Prohibition.**—A statutory prohibition is equally efficacious, and the illegality of a breach of the statute is the same, whether a thing be prohibited absolutely, or only under a penalty.

5. **ESTOPPEL—Recovering Remuneration From One of Two Tortfeasors.**—The fact that a person, injured in a collision between the cars of a railroad and a street car company, was formerly in the employ of the street car company, and which paid him for the time he had lost, his wages while he was laid up, his doctor's bill, and, in addition thereto, \$500, does not preclude his recovery for such injuries from the railroad company, provided he has executed no release, but such payment by one company must apply in reduction of the claim against the other.

Action in Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. SAMUEL C. STOUGH, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed May 23, 1899.

W. H. LYFORD, J. B. MANN and D. W. MUNN, attorneys for appellant.

C. & E. I. R. R. Co. v. Hines.

It is a well settled principle that a satisfaction of damages from one, the action being joint, will operate as a discharge of all, whether the parties intended it or not, in actions against wrongdoers for torts. *Brown v. Kenchelor*, 3 Cold. (Tenn.) 192; *Ruble v. Turner*, 2 Hen. & M. (Va.) 38; *Strang v. Holmes*, 7 Cow. (N. Y.) 224.

A parol release of one of two joint tort-feasors for negligence is a release of both. *Bronson v. Fitzhugh*, 1 Hill (N. Y.) 185.

A release of one joint trespasser is a release of all—it operates as a satisfaction. *Gould v. Gould*, 1 N. H. 473; *Brown v. Marsh*, 7 Vt. 320; *Ayer v. Ashmead*, 31 Conn. 447.

Where the amount of damages for an injury by two or more joint feasors to the plaintiff is undecided, the release to one for a certain sum releases all. *Long v. Long*, 57 Ia. 497; *Urton v. Price*, 57 Cal. 270.

WILLIAM S. FORREST, B. C. BACHRACH and BENSON LANDON, attorneys for appellee.

The evidence does not establish accord and satisfaction. *City of Chicago v. Babcock*, 143 Ill. 358; *West Chi. St. Ry. Co. v. Piper*, 165 Ill. 325; *Wagner v. Union S. Yards & Transit Co.*, 41 Ill. App. 410.

The question of accord and satisfaction was not raised or attempted to be raised on the trial of this case in the court below. *Westgate v. Aschenbrenner*, 39 Ill. App. 264; *Alley v. Limbert*, 35 Ill. App. 592.

MR. JUSTICE ADAMS delivered the opinion of the court.

Between one and two o'clock in the afternoon of February 25, 1897, appellee was a passenger on a street car of the Calumet Electric Street Railway Company, operated by electricity and running west on 103d street in the city of Chicago. The appellant at the same time was operating a passenger train by steam on its right of way and track in a southerly direction from its main depot in Chicago. The right of way and tracks of appellant intersected 103d street

which is an east and west street. A collision occurred at the intersection of appellant's tracks and 103d street between the engine drawing its train and the street car in which appellee was riding. The evidence tends to show that the engine struck the street car about half way between the middle and the front end of the car. The car was completely demolished. Appellee was thrown about twenty feet from the street car by the collision and was seriously injured. The jury found for appellee and assessed his damages at the sum of \$2,000, for which sum judgment was rendered. The negligence charged in the declaration is that appellant, by its servants, negligently and carelessly ran its train at a much higher rate of speed than that permitted by an ordinance of the city of Chicago, which ordinance prohibits the running of passenger trains within the corporate limits of the city at a rate of speed greater than ten miles per hour. The estimate of appellee's witnesses of the speed of the train at the time of the accident varies between forty-five and sixty miles per hour. Appellant's engineer and flagman testified that the speed was about thirty miles per hour and the engineer said that the speed was uniform at that rate. The flagman testified that he did not think that the train slackened its speed as it approached 103d street. There were gates and flagman at the intersection of appellant's tracks and 103d street. The gates were down and the street car crashed into and through them. The evidence as to the speed of the street car is not very definite. One of appellee's witnesses testified that its speed was probably six or seven miles per hour; another, that it was running the usual speed—full speed. The flagman testified that he was running about twelve or fifteen miles per hour at the time it crossed the tracks. That appellant introduced evidence tending to show that by reason of buildings intervening between its train and 103d street, the street car could not be seen approaching the crossing from a point 150 feet distant from the place where the collision occurred; and, also, evidence tending to show that a train, running at the rate of ten miles per hour, could not be

stopped in that distance; but counsel for appellant seem to have omitted from consideration what we think the jury were warranted in inferring from the evidence, namely, that if appellant's train had not been running at a speed in excess of ten miles per hour the street car would have passed the crossing before appellant's train arrived there, and the collision would not have occurred. The fact that the injury to appellee may have been occasioned by the combined negligence of appellant and the street car company can not avail appellant. *Railway Co. v. Shacklet*, 105 Ill. 364; *Street Railroad Co. v. Piper*, 165 Ib. 325.

Appellee, against appellant's objection, introduced in evidence a properly certified copy of a section of an ordinance of the city of Chicago, which is as follows:

"1830. No railroad corporation shall by itself, agents or employes, run any passenger train upon or along any railroad track within the corporate limits of the city of Chicago at a greater rate of speed than ten miles an hour; nor shall any such corporation by itself, agents or employes, run any freight car or cars upon or along any railroad track within said city at a greater rate of speed than sixty miles per hour."

Counsel object that there does not appear to have been any enacting clause to the ordinance, or any penalty prescribed for its violation, and, therefore, it is ineffective. An ordaining or enacting clause is not essential to the validity of an ordinance, even though prescribed by the municipal charter. *City of St. Louis v. Foster*, 52 Mo. 513; *People v. Murray*, 57 Mich. 396; *Dillon on Mun. Corp.*, 4th Ed., Sec. 309.

And so the Supreme Court of the State has intimated. *People v. Lee*, 112 Ill. 113, 121.

Neither do we think the ordinance ineffective because it does not appear that a penalty is prescribed for its violation. The section is expressly prohibitive in terms, and is certified by the clerk to be a true copy of section 1830 of the municipal code of the city passed by the city council, etc. Blackstone defines municipal law as "A rule of civil conduct prescribed by the supreme power in a State, com-

manding what is right and prohibiting what is wrong." 1 Cooley's Bl., marg. p. 44. A statute may be expressly prohibitory, or it may be prohibitory by implication, as by prescribing a penalty. Sedgwick on Con. of Statutes, 2d Ed., p. 71; 1 Kent's Com., 12th Ed., 467.

The latter author says: "The principle is now settled that the statutory prohibition is equally efficacious, and the illegality of a breach of the statute is the same whether a thing be prohibited absolutely or only under a penalty." *Ib.*, citing cases in note b. See also Potter's Dwarrior on Stat., p. 161.

Our statute concerning railroads provides as follows:

"Whenever any railroad corporation shall by itself or agents run any train, locomotive engine or car at a greater rate of speed in or through the incorporated limits of any city, town or village than is permitted by any ordinance of such city, town or village, such corporation shall be liable to the person aggrieved for all damages done to the person or property by such train, locomotive, engine or car, and the same shall be presumed to have been done by the negligence of said corporation," etc. Starr & Curtis' Statutes, Ch. 114, Sec. 93.

The objections to the ordinance were properly overruled. Appellee was a motorman in the employ of the Calumet Electric Street Railway Co., but was not acting as such when injured, he being at that time a passenger on the street car. On appellee's cross-examination he testified, in response to questions asked by appellant's attorney, that the street railway company paid him for the time he had lost, his wages while he was laid up, his doctor's bill, and, in addition \$500; and it is urged that this operated as a settlement in full of all damages suffered by appellee, and precludes a recovery in the present case. It does not appear nor is it claimed that appellee executed any release. The evidence relied on is insufficient to establish the defense of accord and satisfaction. *City of Chicago v. Babcock*, 143 Ill. 358; *W. C. St. R. R. Co. v. Piper*, 165 Ill. 325.

In the *Babcock* case it was held that when part of the damages claimed is paid by one of two tort-feasors, such

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payment must apply in reduction of the claim against the other, and so the court, by request of appellant's attorney, instructed the jury in the present case. No instruction bearing on the question of accord and satisfaction was asked by appellant. We think the objections of appellant's counsel, in respect to instructions given and refused, insufficient to warrant a reversal of the judgment. We find no reversible error in the record, therefore the judgment will be affirmed.

North Chicago St. R. R. Co. v. Lizzie Schwartz.

1. **PLEADING**—*In Personal Injury Cases*.—Where an injury resulted from a sudden jerk of a car caused by an obstruction on the track which was under the defendant's control, an allegation that the obstruction was "in and upon defendant's tracks" is a sufficient allegation that the obstruction was under defendant's control.

2. **NEGLIGENCE**—*Prima Facie Case Shifting the Burden of Proof*.—Where an injury results from a jerk caused by a car striking an obstruction on the tracks, and the evidence shows that the obstruction was under the control of defendant, and the car in passing over it lurched or jerked so severely that the plaintiff was thrown from her seat, a *prima facie* case of negligence is shown, and the burden is cast upon the defendant to rebut the specific negligence charged.

Action in Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed May 22, 1899.

Statement of the Case.—Appellee was injured while a passenger on one of appellant's cable cars December 5, 1895, by being thrown from her seat because of the alleged negligent operation of appellant's train, consisting of a grip and one trailer, a closed car.

Her suit to recover for the injuries, having been tried before the court and a jury, resulted in a verdict of \$3,500 and judgment thereon, from which this appeal is taken.

The declaration has two counts, the first alleging negligence of appellant in operating, propelling and driving its

car against an obstruction in and upon its tracks, whereby appellee was thrown with great force and violence out of her seat and upon the floor of the car, etc.; the second alleging negligence in that the car was driven and propelled against a certain piece of iron or horseshoe which was fastened in the cable slot, gutter, or opening through which the grips connected the cars with the propelling cable, which moved with great speed and force, whereby appellee was thrown from her seat and injured, etc.

The evidence shows that appellant's train was going along Lincoln avenue, Chicago, and when it reached a point a short distance south of Fullerton avenue it stopped; that in front of the grip-car there was some obstacle or obstruction in the cable slot which the gripman tried to remove, but did not succeed; that a workman came with a box of tools from toward the city, and tried to remove the obstacle, but could not do it; that then, after a lapse of ten or fifteen minutes, some one shouted to the passengers in the train to sit down (appellee had remained seated all the time, however), whereupon the train began to move, and immediately thereafter there was a severe jerk or lurch of the car in which appellee was seated, by means of which she was thrown from her seat to the floor of the car. What the obstruction was does not clearly appear from the evidence.

As a result of the fall appellee, who was then about twenty-seven years of age, a married woman, suffered a permanent injury to her knee joint, from which she had great pain for several weeks; her limb was incased in a plaster cast four or five weeks; she was compelled to use crutches from six to nine days and a cane four or five weeks, and at the time of the trial she testified: "I am never without any pain; I can not say that it is one day that I haven't pain in the knee, and when I am weary it is always weak. I can never go anywhere any distance alone except to go to the store, to the meat market and my mother's. I never go anywhere else alone. I have my husband with me or one of my sisters. I have always some-

body with me for fear I would drop and not have any assistance. Prior to this accident I did the housework at my house. Since the injury I do the light housework, but I don't do all of it," and also that her knee was affected by changes in the weather. She is corroborated by several witnesses as to the weak condition of her knee and her difficulty in going about. Dr. Ochsner, a surgeon of twelve years experience, who examined her October 10, 1897, while asleep under the influence of chloroform, testified that the knee was then in an inflamed condition; that there was a sub-acute inflammation of the knee—a thickening of the ligaments and a roughening of the surface of the knee joint, and also a roughening of the lower surface of the knee cap; that it was impossible to straighten the joint perfectly without force; that the injury, in his opinion, was permanent; that it was likely to lessen until after a few years, and as she grew older after that time, it was likely to increase.

Dr. Weatherly, a physician who attended appellee from December 7, 1895, for several months, and gave attention to her up to the time of trial, having seen the knee during that period twenty-five or thirty times, testified that when Dr. Ochsner examined appellee her knee was stiff; also that "the whole joint is injured, the bones, the ligaments and the synovial membrane that covers the articular surface; that is my opinion; it is what we call an arthristis chronic inflammation of the joint, or sub-acute." * * *

"A good part of the strength is gone. She can't use the knee, and in my opinion never will be able to use it as she uses the other knee, or as she used this knee previous to the accident. I think it is a permanent injury. She can't completely straighten it, neither can she completely bend it up. It is a stiff leg. She can't work around with it. She can't perform the functions of a housewife altogether, and it would render her unable to walk securely. She is liable to get a catch when she is walking—stiffen up on her—get caught when it is half-way flexed—become unable to walk. In my opinion it is permanent. If she has to work on her knee probably her knee will become worse so she can't

use it. It is all speculation to say exactly what will be the result."

There was also evidence that appellee, before and after the injury to her knee, had a polypus in the womb caused by chronic inflammation, which, in the opinion of Dr. St. John, who testified for appellant, might have affected her knee joint; that appellee was seen at different times by several witnesses to walk without any apparent difficulty, there being nothing unusual in respect to her walking; that she danced both round and square dances; and Dr. Germer, who attended her first after her injury, testified there was no external evidence of injury to the skin, and that on January 5, 1896, a month after the accident, the knee was nearly recovered from the injury.

The only instruction given for appellee is, viz. :

"1. The court instructs the jury that the defendant, The North Chicago Street Railroad Company, is required to use all reasonable means, care, vigilance and foresight, in view of the character and modes of conveyance adopted by it, to prevent injury to passengers, and while said company is not an insurer of absolutely safe carriage of its passengers, yet it is held to the exercise of the highest degree of care, skill and diligence practically consistent with the operation of its road."

The jury was quite fully instructed at request of appellant, and no complaint is made in that regard.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

CUNNINGHAM, VOGEL & CUNNINGHAM, attorneys for appellee.

Proof that the plaintiff was a passenger, that the accident happened, and that the injury was inflicted, imposed upon the carrier the duty to explain the accident, and to prove that it resulted from a cause for which the carrier should not be held responsible. *P., C. & St. L. Ry. Co. v. Thompson*, 56 Ill. 141; *Eagle Packet Co. v. Defries*, 94 Ill. 598; *N. C. S. Ry. Co. v. Cotton*, 140 Ill. 486; *Chicago City Ry. Co. v. Engel*, 35 Ill. App. 490; *Gleeson v. Virginia Midland*

Railroad Co., 140 U. S. 435; G. & C. U. R. R. Co. v. Yarwood, 15 Ill. 468.

In many cases it has been held that in a suit by a passenger against a carrier for an injury, the mere proof of the accident by which the injury was occasioned is sufficient to throw the burden on the carrier to show that he exercised due care, and there seems to be a general concurrence of authority that where there was an absence of *vis major*—and it is shown that the injury happened from the abuse of the agencies within the defendant's power—it will be inferred from the mere fact of the injury that the defendant acted negligently. N. C. S. Ry. Co. v. Cotton, 140 Ill. 494.

Where a car was overturned on the defendant's road, in which plaintiff was a passenger, without fault on his part, he thereby makes out against the company a *prima facie* case of negligence and places upon it the burden of rebutting that presumption by proving that the accident resulted from a cause for which it could not be held responsible. P., C. & St. L. Ry. Co. v. Thompson, 56 Ill. 138.

The happening of an accident to a passenger during the course of his transportation raises a presumption that the carrier has been negligent; the burden of rebutting this presumption rests upon the carrier. Undoubtedly the law requires the plaintiff to show that the defendant has been negligent, but where the plaintiff is a passenger a *prima facie* case of negligence is made out by showing the happening of the accident. If the injury to a passenger is caused by apparatus wholly under the control of the carrier, and furnished and applied by it, a presumption of negligence on its part will be raised. N. Y. C. & St. L. R. R. Co. v. Blumenthal, 160 Ill. 48.

MR. PRESIDING JUSTICE WINDES, after making the above statement, delivered the opinion of the court.

Appellant contends, first, the verdict is not warranted by the evidence; second, that the verdict is excessive; third, that the court erred in giving appellee's instruction; and, fourth, also in the admission of evidence.

First. It is claimed that under the first count, there being no allegation that the obstruction against which the car ran was under the control of appellant, the burden of proof could not shift to appellant, and it was not sufficient to make a *prima facie* case, and thus shift the burden to appellant, for appellee to show that she was a passenger, and was injured while riding in the car, without showing affirmatively that the jerk or lurch of the car which threw appellee from her seat was caused by the striking of the car against an obstruction on the tracks. If it be conceded that this contention is correct, still we are of opinion, from the evidence above stated, the jury were justified in finding that the lurch or jerk of the car was caused by an obstruction on appellant's tracks which was under its control. The allegation that the obstruction was "in and upon defendant's tracks" was, however, a sufficient allegation that the obstruction was under appellant's control, and the evidence clearly shows that appellant did control the obstruction.

If it be conceded that the evidence fails to show that the jerk was caused by the car striking the obstruction, still the evidence showing that the obstruction was under the control of appellant on its tracks, and the car in passing over it lurched or jerked so severely that appellee was thrown from her seat, there was a *prima facie* case of negligence shown, and the burden was thus cast upon appellant to rebut the specific negligence charged. *Cramblett v. R. R. Co.*, 82 Ill. App. 542, and cases there cited.

The second count may be disregarded because the proof fails to show what the obstruction in the cable slot was.

Second. The verdict is large, but we can not say, from a careful examination of the evidence, but that the jury were warranted in awarding the amount they did. If the jury believed appellee and her witnesses, and we are not prepared to say their evidence was not entirely credible, the verdict is not excessive.

The evidence that appellee danced after her injury is explained by her and her physician. The physician testified

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that he advised her to use her knee—take daily walks and even to dance, in the hope that moderate exercise would prevent her knee from becoming permanently stiff. Appellee acted on his advice and danced on two occasions.

Third. We see no tenable objection to appellee's instruction. The claim of appellant that it does not apply to the case made by the declaration, can not be sustained. It could not, in our opinion, have misled the jury, because it is general in its scope. It could not reasonably have been referred to any liability of appellant not alleged nor proven. In the admission of the evidence complained of, we see no reversible error, and it seems unnecessary to refer to it specifically.

The judgment is affirmed.

The Fair v. Jose Morales & Co.

1. **TRADE-MARKS—Conveyancing.**—A trade-mark can not be conveyed in gross, by independent transfer, without also conveying the business to which the trade-mark attaches.

2. **SAME—Equitable Jurisdiction.**—Courts of equity are not without jurisdiction to grant relief in cases of inequitable and fraudulent competition by imitation of labels, names, etc., for the purpose of palming off goods as those of another, even when there is no exclusive and proprietary right in such labels, names, etc., as trade-marks.

Injunction.—Appeal from an interlocutory order entered in the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed May 8, 1899.

Statement of the Case.—This is an appeal from an interlocutory order granting a temporary injunction. The injunction restrains appellant from the use of the words "La Matilde," and from the use of certain labels upon boxes of cigars other than those manufactured by appellee.

The order was based upon verified bill of complaint, filed by appellee, and upon exhibits thereto, consisting of cigar

boxes used by appellee, and others used by appellant, labels, newspaper advertisements, etc.

From the allegations of the bill of complaint and the exhibits, it would appear that appellee, the complainant below, is a Florida corporation, engaged for more than five years in manufacturing and vending cigars in the United States and foreign countries, with its principal place of business at Port Tampa, Florida; that its cigars are sold, and have been for years, under the brand or name "La Matilde;" that they are put up in boxes with certain labels, marks and names, as shown by boxes with labels attached presented as exhibits; that the trade-mark and trade name "La Matilde" is owned and controlled by complainant and was conveyed to complainant by Josefa Valdes, widow of one Morales, of Havana, Cuba, who had been, long before the conveyance, manufacturing and vending cigars under that name, and under whose manufacture the brand had become widely known to the public; that the brand and mark "La Matilde" have been duly registered, both under the laws of the State of Illinois and of the United States; that from the long period of the use of the trade-mark, trade name and trade label in the sale of high grade cigars, complainant has been enabled to build up a large and lucrative business in the sale of cigars, yielding a large profit; that defendant has adopted and is using in the sale of cigars the trade-mark "La Matilde," and is selling cigars under that name in boxes resembling in all appearances the boxes of complainant and bearing labels in imitation thereof; that specimens of the infringing boxes are affixed as exhibits, and that the adoption and use by The Fair of said name and label are flagrant violations of complainant's rights therein, the said label having been used by it for a long period of years, and being widely known to the public as representing a brand of cigars manufactured by complainant, having a widespread reputation, and being of great value to complainant; that defendant has made certain sales of cigars to complainant's agents, representing them to be genuine "La Matilde" cigars, and is falsely

advertising the sale of the celebrated "La Matilde" cigars at half regular prices, specimens of which advertisements cut from newspapers are attached; that the cigars so advertised and sold by defendant are not the genuine "La Matilde" cigars, but are spurious and made solely for the purpose of deceiving the public and in flagrant violation of complainant's rights; that thereby the public is deceived and complainant defrauded out of large gains and profits, and damage and injury irreparable, etc., inflicted upon complainant. The prayer of the bill of complaint is, that an accounting may be had of profits and damages, and defendant enjoined from the use, sale, display, advertising or offering for sale of any imitation, counterfeit or spurious label, devices, pictured symbols, trade name, trade-mark and forms of advertisement in violation of complainant's rights, etc.

Upon these verified allegations and the exhibits, after notice to appellant, the order appealed from was entered.

FRANK F. REED and MORAN, KRAUS & MAYER, solicitors for appellant.

Upon this record the appellant (defendant below) asks the reversal of the injunctive order upon complainant's own showing, because it is clearly apparent that:

Complainant did not acquire, and does not possess, any right to the so-called "La Matilde" marks and labels, because complainant's alleged acquisition thereof included no business, assets or good will, but only the bare right to employ the trade-mark and labels formerly used by the deceased Morales. Such transfers and uses of trade-marks and labels are universally condemned and forbidden by courts. Browne on Trade-marks (2d Ed.), Sec. 363; 26 Am. & Eng. Ency. Law, 371, 374; Kerly on Trade-marks, p. 272; Sebastian on Trade-marks, p. 11; MacVeagh v. Valencia Cigar Factory, Price & Steuart T. M. Cases, 970; 32 O. G. 1124; Samuel v. Berger, 24 Barb. 163; R. Cox, 178; Messer v. The Fadettes, 168 Mass. 140, 46 N. E. Rep. 407; Ex parte Lawrence, Cox Man.; Mayer v. Flannagan, 34 S. W. Rep. 785; Weston v. Ketcham, 51 How. Pr. 455; Witt-

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haus v. Braun, 44 Md. 303, 22 Am. Rep. 44; Cotton v. Gillard, 44 L. J. Ch. 90; Hammond v. Brunker, 9 R. P. C. 301; Leather Cloth Co. v. Am. Leather Cloth Co., 4 De G., J. & S. 136, 142; 11 House Lords Cases, 522, 531 and 533; Wood v. Lambert, L. R. 32 Ch. Div. 247, 3 R. P. C. 81; Thorneloe v. Hill, 8 Rep. 718, 11 R. P. C. 61; Pinto v. Badman, 8 R. P. C. 181.

That by the positive announcements repeated upon the box, the get-up of the labels, the use of Havana, Cuba, No. 127 Galiano street, as the business address of Jose Morales & Co.; the words of the written guarantee and the omission to state distinctly and clearly the actual maker and place of manufacture, and the false statements on the labels with respect thereto, complainant itself is deceiving the public as to the maker and place of manufacture of its cigars, and is foisting off its product made at Port Tampa City, Florida, by a corporation of that State, as manufactured at Havana, Cuba, by J. Morales at his factory, No. 127 Galiano street. Misrepresentations, both positive and implied, in reference to the person who makes, the place where made, or material of which made, disentitle a mark to recognition or protection in a court of law or equity. There is no such right as a monopoly in gulling the public. Stachelburg v. Ponce, 23 Fed. 430; Manhattan Medicine Co. v. Wood, 108 U. S. 218; Partridge v. Menck, 1 How. App. Cases 558, R. Cox, 72; Palmer v. Harris, 60 Pa. St. 156; R. Cox, 523; Parlett v. Guggenheimer, 67 Md. 542, 10 Atl. Rep. 81; Prince Metallic Paint Co. v. Prince Mfg. Co., 135 N. Y. 24, 31 N. E. Rep. 990; Royal Baking Powder Co. v. Raymond, 70 Fed. Rep. 376; Raymond v. Royal Baking Powder Co., 85 Fed. Rep. 231; American Cereal Co. v. Eli Pettijohn Co., 72 Fed. 903; aff'd 76 Fed. 372; Connell v. Reed, 128 Mass. 477; Joseph v. Macowsky, 96 Cal. 518, 31 Pac. Rep. 914; Kenney v. Gillett, 70 Md. 574, 17 Atl. Rep. 499; Heyde v. Wittkowsky, 5 N. S. Wales, L. R. (E.) 75; Labatt v. Trester, 7 Rev. Legale, 386, 2 St. Dig. 725; Candee v. Deere, 54 Ill. 439; Bolander v. Peterson, 35 Ill. App. 551, 136 Ill. 215; Siegert v. Abbott, 61 Md. 276, 48 Am. Rep.

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401; *Pepper v. Labrot*, 8 Fed. Rep. 29; *Millbrae Co. v. Taylor* (Cal.), 37 Pac. Rep. 235; *Pillsbury Co. v. Eagle*, 86 Fed. Rep. 608; *Wilson v. Neederman*, 19 Wk. L. B. 268; *Coleman v. Dannenberg Co.* (Ga.), 30 S. E. Rep. 639; *Krauss v. Peebles Co.*, 58 Fed. Rep. 585; *Hobbs v. Français*, 19 How. Pr. 567; *Hilson v. Foster*, 80 Fed. 896; *Solis Cigar Co. v. Pozo*, 16 Colo. 388, 26 Pac. Rep. 556; *California Fig Syrup Co. v. Putnam*, 66 Fed. 750, 69 Fed. 740; *California Fig Syrup Co. v. Stearns*, 67 Fed. Rep. 1008, 73 Fed. Rep. 812; *Ginter v. Kinney*, 12 Fed. Rep. 782, P. & S. 694; *Laird v. Wilder*, 2 Bush. 131, 15 Am. Rep. 707; *Newman v. Pinto*, 57 L. T. (N. S.) 31, 4 R. P. C. 508; *Wood v. Lambert*, L. R. 32 Ch. Div. 247, 3 R. P. C. 81; *Leather Cloth Co. v. Am. Leather Cloth Co.*, 4 De G., J. & S. 136, 11 H. L. C. 522.

The registration under Federal and State laws conferred no additional right and in no way relieves from the false statements. *Moorman v. Hoge*, 2 Sawy. 78; *Hennessey v. Braunschweiger*, 89 Fed. Rep. 664; *Wood v. Butler*, 3 R. P. C. 81, L. R. 32 Ch. Div. 247; *Ex parte Farnum & Co.*, Com. Dec., U. S. Pat. Off., 1880, 155; *New. Dig. Trade-mark*, 211.

DOW, WALKER & WALKER, attorneys for appellee.

Appellee herein contends that, being the successor of the originator of the trade-mark, trade name and trade labels set forth in the bill of complaint, as well as the successor of the original business, it has the unquestioned right to use those trade-marks, trade names and trade labels as they have been used by it and its predecessor or predecessors, and in view of that fact appellee is using the trade-mark, trade labels and brand honestly as is its right. *Snyder Mfg. Co. v. Snyder et al.*, 54 Ohio St. 86; *Horton Mfg. Co. v. Horton Mfg. Co.*, 18 Fed. Rep. 818; *Williams v. Farrand*, 88 Mich. 473; *Fish Bros. Wagon Co. v. La Belle Wagon Works*, 82 Wis. 546; *Edleston v. Vick*, 18 Jurist, 7; *Allegretti v. Allegretti*, 76 Ill. App. 581; *Allegretti v. Keller*, 85 Fed. Rep. 643; *Solis Cigar Co. v. Pozo et al.*, 16 Col. 388; *Marshall et al. v. Pinkham*, 52 Wis. 572; *Hilson Co. v. Foster et al.*, 80

Fed. Rep. 896; Stachelberg v. Ponce, 23 Fed. 430, 125 U. S. 686; Manhattan Medicine Co. v. Wood, 108 U. S. 218; Clark Thread Co. v. Armitage, 67 Fed. Rep. 896, 74 Fed. Rep. 936; Cochrane v. Macnish, 1896 Appeal Cases, 225; Merry v. Hoopes et al., 111 N. Y. 415; Leather Cloth Co. v. American Leather Cloth Co., 4 DeG., J. & S. 145; Insurance Oil Tank Co. v. Scott, 33 La. Ann. 949; Caswell et al. v. Hazard, 121 N. Y. 484; Palmer v. Harris, 60 Pa. St. 156; Hobbs v. Francais, 19 How. Pr. 567; Connell v. Reed, 128 Mass. 477; Brown on Trade-marks, 2d Ed., Sec. 71 to 75; also p. 85, with notes on last case; Brown, Sec. 777; Pillsbury-Washburne Flour Mills Co. v. Eagle, 86 Fed. 608; Congress Spring Co. v. High Rock Spring Co., 47 N. Y. 291; Banks v. Gibson, 34 Beavan, 566; Hull v. Burrows, 10 Jurist, 55 N. S.; Pidding v. How, 8 Simon, 476; California Fig Syrup Co. v. Worden, 86 Fed. Rep. 212; The Le Page Co. v. Russia Cement Co. 51 Fed. Rep. 941; Kidd v. Johnson, 100 U. S. 617; Frazer v. Frazer Lubricator Co., 121 Ill. 151; Walter Baker & Co., v. Sanders et al., 80 Fed. 889.

Irrespective of the technical question of trade-mark no one has the right to dress up their goods in such a manner as to deceive intending purchasers, and beguile the public into the belief that they are buying goods of a rival manufacturer. Coats v. Merrick Thread Co., 149 U. S. 562; Walter Baker Co., v. Sanders et al., 80 Fed. Rep. 889; Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169; Pillsbury-Washburne Flour Mills Co. v. Eagle, 86 Fed. Rep. 608; Sawyer v. Horn, 1 Fed. Rep. 24; Sawyer v. Kellogg, 7 Fed. Rep. 720; Parlett et al. v. Guggenheimer et al., 67 Md. 542; Lever v. Goodwin, 36 Ch. Div. 1; Enoch Morgan's Sons Co. v. Schwachofer, 5 Abb. Pr. (N. C.) 265; Peterson v. Humphrey, 4 Ab. Pr. 394; McLean v. Fleming, 6 Otto, 245; Colman v. Crump, 70 N. Y. 573; Caswell v. Davis, 58 N. Y. 223; Taylor v. Gillis, 59 N. Y. 331; Talcott v. Moon, 6 Hun, 106; Rose v. Loftus, 38 Law Times Rep. N. S. 409; Singer Mfg. Co. v. Wilson, L. R. 3 App. Cas. H. L. 376.

The object of the law in protecting trade-marks and compelling fair competition is two-fold; first, to secure to one

who has been instrumental in bringing into the market a superior article of merchandise, the fruits of his industry and skill; and, secondly, to protect the community from imposition, and furnish some guaranty that an article, as the manufacture of one who has appropriated to his own use a certain name, symbol or device, is genuine. Brown on Trade-marks, 2d Ed. Sec. 30; Boadman v. The Meriden Britannia Co., 35 Conn. 402; Blackwell v. Wright, 73 N. C. 310; Matsell v. Flanagan, 2 Abb. Pr. (N. S.) 459; Kinney v. Basch, 16 Am. L. Reg. N. S. 596; Lee v. Haley, 21 L. T. N. S. 546; Pillsbury-Washburne Flour Mills Co. v. Eagle, 86 Fed. 608.

MR. JUSTICE SEARS delivered the opinion of the court.

The bill alleges, among other things, ownership in appellee of the trade-mark "La Matilde" and an infringement through use of same by appellant.

It is contended by appellant that the allegations of the bill of complaint are not sufficient to entitle appellee to relief upon this ground. And we regard the contention as sound. For, while the bill does allege ownership, it, nevertheless, in alleging the facts upon which such ownership is based, sets forth an original adoption and use of the trade-mark by another, one Morales, and a conveyance of the trade-mark to appellee, without alleging that appellee succeeded to the business of the originator, *i. e.*, the business to which the trade-mark originally attached. That trade-marks can not be thus conveyed in gross by independent transfer, without also conveying the business to which the trade-mark attaches, is established by many decisions of different jurisdictions, among which are: Dixon v. Guggenheim, 2 Brewster (Pa.), 321; Witthaus v. Brown, 44 Md. 303.

Nor do we regard the indefinite allegation that the trade-mark was registered by some one as sufficient to show even *prima facie* ownership in appellee.

There is, however, another and a quite distinct ground for relief presented by the bill of complaint, *viz.*, an unfair

and fraudulent competition by appellant, in that appellant by dressing its goods up in imitation of the goods of appellee not only assuming its claimed trade mark, but as well by simulating its labels and the general appearance of its boxes is fraudulent, undertaking to palm off its goods upon the public as the goods of appellee, which latter through at least five years of manufacture and sale, have become known to the public.

Courts of equity are quite ready to find ground of jurisdiction and for relief in such inequitable and fraudulent competition by imitation of labels, names, etc., for the purpose of palming off goods as those of another, even when there is a lack of exclusive and proprietary right in such labels, names, etc., as trade-marks. *Croft v. Day*, 7 Beav. 84; *Sawyer v. Horn*, 1 Fed. Rep. 24; *Merchants Detective Ass'n v. Merchants M. Agency*, 25 Ill. App. 250; *O'Kane v. West End D. G. S.*, 72 Ill. App. 297.

We are of opinion that there is here such a showing of fraudulent acts and intent as bring the case presented by allegations and exhibits within the doctrine announced in the foregoing cases.

But it is contended by appellant that it appears from the allegations of the bill of complaint and the exhibits that appellee is itself fraudulently simulating the trade-mark and labels of another, viz., one Morales, and that therefore it is not entitled to any protection in equity against appellant, and it is urged that this contention avails as well against the allegations of unfair and fraudulent competition as against the allegations of ownership of trade-mark. In this behalf it is argued that the labels and decorations of the boxes of appellee, which are made exhibits, disclose that appellee is presenting its goods to the public as manufactured in Havana by Jose Morales, while the fact is, as the bill states, that they are manufactured in Florida by Jose Morales & Co., the appellee.

If such a state of facts should be concluded from the bill of complaint and exhibits, then the contention would be tenable. But we can not draw any such conclusion from the bill and exhibits. The bill alleges that appellee is

engaged in manufacturing and vending cigars in the United States and foreign countries. The exhibits, if they are to be considered for the purpose of raising this question, are also entitled to consideration in resolving the question in favor of appellee so far as they tend thereto. There are upon the boxes the words "La Matilde de J. Morales," and also words which mean in English "Tobacco factory of Jose Morales, No. 127 Calzada de Galiano street, Havana." If they stood alone it might be said that these words were likely to mislead the public into a false belief that the cigars were made at a factory of Jose Morales, and not at a factory of Jose Morales & Co., the appellee. There is nothing in either bill of complaint or exhibits to lead to the conclusion that appellee does not manufacture cigars at the street number named in Havana; and the allegations are that it does manufacture in foreign countries. From other parts of the exhibits it may be said that there is no attempt to mislead the public in this behalf. The name of the appellee appears in several places upon the box, and in at least one place is located at 127 Galiano street, Havana. In a conspicuous place at the top of the filled box, appears a loose paper, upon which is plainly printed the following:

"NOTICE TO THE PUBLIC.

The tobacco we use in our factory in manufacturing our well known 'La Matilde' brand, we guarantee to be the finest Vuelta Abajo wrappers and fillers obtainable on the Isle of Cuba, and we employ only the best and most skilled Cuban workmen.

This is equally true of our branch factory, No. 184 District of Florida, as all of the tobacco there used is shipped and specially prepared and packed in zinc-lined cases in our Havana factory and shipped to our Florida factory weekly as needed, thus preserving all the fine aroma of the tobacco and making the cigars there manufactured equal to our celebrated imported cigars manufactured in Havana under this brand.

We guarantee every box to be as represented.

Very respectfully,

JOSE MORALES & Co.

Havana, Cuba, April 1, 1898."

From these exhibits, taken together with the allegations of the bill of complaint, we can not say that the chancellor should have concluded that the appellee was guilty of fraud in its use of the name and labels which it now seeks to have protected.

If there is an inconsistency in the use of the name "Jose Morales" upon the box without the accompanying "& Co." it is not of itself so likely to mislead and deceive as to impute bad faith to the appellee, to the defeat of its equities. *Edelston v. Vick*, 23 L. & E. Rep. 51; *Dixon v. Guggenheim*, 2 Brewster (Pa.), 321; *Dole v. Smithson*, 12 Abbott's Pr. 237.

We are not informed by bill of complaint or exhibits, or by anything save the argument of counsel, that the name of Jose Morales was ever used by any other than appellee in the manufacture and sale of cigars.

We are of opinion that the order for a temporary injunction was warranted.

The order is affirmed.

**O. S. Richardson Fueling Company v. Claudius Peters,
Adm'r.**

1. **DAMAGES**—*Death From Negligent Act—Effect of Remarriage of the Widow.*—The fact of the marriage of the widow of a person killed through the negligence of another and that her present husband stands in *loco parentis* to the children can not be considered in fixing the amount of damages.

Action in Case.—Death from negligent act. Trial in the Circuit Court of Cook County; the Hon. CHARLES A. BISHOP, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed May 22, 1899.

WM. M. JOHNSON, attorney for appellant.

JAMES V. O'DONNELL, attorney for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment for \$5,000 in favor of appellee and against appellant, rendered on the verdict of a jury in an action in case for the alleged negligence of appellant, which is claimed to have caused the death of John Paczkowski, plaintiff's intestate. August 24, 1895, the plaintiff's intestate and five other men were employed by appellant to load coal from appellant's scow onto the steamer Petoskey. While the intestate was so employed he fell off the scow into the water and was drowned. He left him surviving Martha, his wife, and four children, the eldest of whom was, at the time of the trial, about eight years and the youngest about three years of age. The deceased was thirty-three years of age at the time of his death, had been in this country about twelve years, was earning \$1.75 per day, and, in his lifetime, supported his wife and children. His widow married again in August, 1896, her present married name being Martha Schroeder.

The accident occurred in a slip called the Michigan slip, which is off from and west of Lake Michigan. The slip is about eighty feet in width from north to south. At the time of the accident the steamer Kalamazoo was on the north side and the steamer Petoskey on the south side of the slip; the bows of the two steamers pointing east toward the lake, and their sterns being at the west end of the slip. The dimensions of the steamers are: Kalamazoo, 161 and 7-10 feet in length; beam, 31 and 5-10 feet; Petoskey, 171 feet 3 inches long; 30 feet and 4 inches beam. The scow is 87 feet in length by 22 feet in width and lay in the slip between the two steamers, and its west end was fastened to the Petoskey at about the middle gangway of the latter for the purpose of loading the coal into the vessel from the scow. How far the scow and Petoskey were apart at the point where they were fastened together, does not exactly appear. Some of the witnesses say three or four feet, or maybe less. The east end of the scow was not fastened to the steamer. The deck of the steamer was higher than the scow, and from it to about the middle of the scow's deck

a gangplank was extended, up which the men wheeled the coal in wheelbarrows to the Petoskey. The deck of the scow was a horizontal plane, in shape a rectangular parallelogram, its ends and sides straight and unprotected by guards of any kind. The coal was in the east end of the scow.

Appellee's intestate and the other men employed with him, went to work loading the coal from the scow onto the steamer Petoskey, in the evening of August 24, 1895. The exact time they commenced work can not be ascertained from the evidence, but the preponderance of the evidence is that it was dark. There were no lights on the scow. There was a light on the Petoskey which shed light on the gangplank but not on or near the coal pile from which the men wheeled the coal. The deceased was loading coal into a wheelbarrow from the east end of the scow and near to its south side, the side nearest the Petoskey. When he loaded his wheelbarrow he started in a northwesterly direction to the end of the gangplank, which, as before stated, reached to about the middle of the deck of the scow; thence he wheeled the coal up the gangplank into the steamer. The construction of the deck of the scow is thus stated by appellant's witnesses: The deck consisted of two-inch timber covered with a sheathing of inch stuff dressed down to about seven-eighths of an inch. It is admitted that there was a depression in the deck, called by appellee's witnesses a hole, but there is a conflict of evidence as to the dimensions of the depression and its situation in reference to the south side of the scow. One of appellee's witnesses testified that the hole or depression extended from the south edge of the scow north eight feet, another six to ten feet, and that it was from eight to ten inches wide, and both that it was about one and one-half or two inches in depth. One of appellant's witnesses testified that he knew the condition of the scow; that there might have been holes in the deck through the sheathing, near the coal pile; that he couldn't just say; that he did not know of any spot on the deck where there was a hole through the lower floor. Another

of appellant's witnesses testified that one piece of the sheathing was out, leaving a depression three to four feet in length and about six or eight inches wide, the nearest point of which to the edge of the scow was five feet. Another of appellant's witnesses testified that two or three days after the accident he examined the deck and that there was no hole in it. The evidence tends to show that the scow was an old one. The wheelbarrows used by the men were made of iron, with wheels about eighteen inches in diameter, and, when loaded, carried at least 300 pounds of coal. Two of appellee's witnesses testified that the wheelbarrow furnished to and used by the deceased was an old one, the bottom, handles and wheel of which were loose and shaky. One of them testified that a man could not steady it. Appellant's evidence tends to contradict that of appellee's witnesses as to the condition of the wheelbarrow. The evidence shows that between ten and eleven o'clock at night, when it was dark, the deceased had loaded his wheelbarrow with coal at the south side of the scow and near to its edge, and that he started for the end of the gangplank; that the hole or depression was near to where he loaded the wheelbarrow, and on his route to the gangplank, and that, about where the hole was he fell into the slip and was drowned. His wheelbarrow fell in at the same time. It does not appear that the deceased ever worked on the scow, or used the wheelbarrow in question, before that night, but it appears from the evidence that he had wheeled quite a number of loads over it that night before the accident.

One of appellee's witnesses, who testified through an interpreter, thus describes the accident:

"I saw John fall into the lake. I was standing there and was looking toward him. I saw the place where he fell in. The boat was about five feet away from the Petoskey, and the other end might have been about twelve feet, and then I seen a hole which was about eight feet long at the place where he had to cross with his wheelbarrow, which was about eight inches wide and two inches thick. The scow was standing toward the north. John was taking the wheelbarrow; he was pushing it across the hole; then the wheelbarrow kicked up and hit him in the leg and

threw him into the river, and I went to save him, but I could not do it."

Appellant's counsel contends that the verdict is contrary to the evidence; that the preponderance of the evidence is against it. In view of the conflict of evidence as to the condition of the scow and the wheelbarrow, we think the questions of the care exercised by the deceased, and the alleged negligence of appellant, were proper questions for the jury, and, after careful consideration of the evidence and the argument of appellant's counsel, we have concluded that we can not disturb the verdict on the ground that it is not supported by the evidence. Counsel for appellant questions the credibility of appellee's witnesses. The credibility of the witnesses was a question for the jury and the court, who saw the witnesses and heard them testify, thus having a better opportunity to judge of their credibility than can a court of review, overruled appellant's motion for a new trial.

Appellant's counsel complain of the refusal of the court to give the following instruction:

"The jury are instructed, as a matter of law, that there can be no recovery against the defendants under that count in his declaration which alleges that the defendants failed to fasten the rear part of the scow to the vessel Petoskey."

We are of opinion that the evidence was not sufficient to support a verdict on the count referred to in the instruction, but are not of opinion that the refusal to give the instruction is reversible error. There are other counts in the declaration charging negligence, which are supported by the evidence. *Railroad Co. v. Blumenthal*, 160 Ill. 40, 49; *Illinois Steel Co. v. Schymanowski*, 162 Ib. 447, 457.

The court gave twenty-five instructions for appellant, fully setting forth the reciprocal duties and obligations of the parties.

It is contended that the amount awarded as damages is excessive, and, in support of this contention, it is urged that the widow of the deceased has married again, and has thus secured a new means of support, and that her present hus-

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band stand in *loco parentis* to the children. We think this view untenable, and do not regard the amount of damages ground for reversal.

We find no reversible error in the record.

The judgment will be affirmed.

J. R. Ward et al. v. P. Schiesswohl et al.

1. APPEALS—*From Justices—Appearances and Jurisdiction.*—An appeal was taken by plaintiff from a justice by filing his bond in the Superior Court within twenty days after judgment (January 12, 1897). A supersedeas was served on the justice and a summons on the defendant. April 16, 1897; the transcript was filed September 20, 1897. *It was held*, that the Superior Court had complete jurisdiction to hear the case at the April term, 1898, without further appearance of the defendants.

Assumpsit, for goods sold. Trial in the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed May 22, 1899.

J. R. WARD, attorney for appellants.

WINSLOW & WARD, attorneys for appellees.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

Appellees, after a trial before a justice of the peace, recovered a judgment against appellants for \$81.92, but, claiming they were entitled to a larger amount, appealed to the Superior Court, filing their bond in that court. The summons on appeal was served on the defendants below, appellants here, April 16, 1897; a transcript from the justice was filed in the Superior Court, September 20, 1897, and defendants entered their appearance April 11, 1898, and on the same day, at the April, 1898, term of the court, the case, being on the short cause calendar, was tried in the absence of defendants, before the court and a jury, resulting in a verdict and judgment against appellants of

\$196.71, from which judgment, and the order of said Superior Court overruling appellants' motion to vacate the same, this appeal is taken.

The evidence heard on the trial shows that appellants were indebted to appellees in the sum of \$196.71 for groceries, meats and provisions sold and delivered to appellants for family use between January 1, 1896, and August 11, 1896, after allowing all credits and deductions; that appellees sent statements of the account to appellants from time to time, and the account was not disputed until one of the appellees went to Mr. Ward's office to collect it, when he refused to pay it. On the motion of appellants to vacate the judgment, set aside the verdict, and for a new trial, and affidavit of J. R. Ward was read, which tends to show that appellants were diligent in the watching and preparation for the trial of the case, and appellees had been paid on the account January 30, 1896, \$114.25, and that the appellants were not indebted to appellees to exceed \$82.46; but it is not clearly and specifically stated in the affidavit that said amount was paid on the account in question, and the trial court was justified in believing that the payment was on account of dealings between the parties prior to January 1, 1896, by reason of which the affidavit tends to show there was due to appellees just the sum of \$114.25. Mr. Ward does not swear there were two payments of that amount, and unless there were, then we are of opinion the judgment was correct. We can not say the learned trial judge was wrong in overruling appellants' motion, and we think the evidence was sufficient to support the judgment.

It is also argued that there was no jurisdiction to try the case at the April, 1898, term of the Superior Court, because appellants did not enter their appearance until the day of the trial. No appearance of appellants was necessary to give the court jurisdiction. That was obtained by service of summons on appellants April 16, 1897, and the filing of the transcript September 20, 1897. Hurd's Rev. Stat., Ch. 79, Secs. 65, 68 and 70 (Act of 1874); *Camp v. Hogan*, 73 Ill. 228; *Lehman v. Freeman*, 86 Ill. 208. The judgment is affirmed.

**Warren B. Howe, Frank B. Davidson and Homer W. Howe,
Copartners as Howe & Davidson, v. Albert Medaris.**

1. **PRACTICE**—*Where a Case Should be Submitted to the Jury.*—Where a case presents questions peculiarly for the consideration of the jury it is the duty of the court to submit the case accordingly.

2. **PERSONAL INJURIES**—*Knowledge Will Not Debar a Recovery.*—The fact that a person could see and know the defective condition of a machine, is not sufficient to debar him recovering for an injury, but to do so the danger of operating it must be so open and apparent that no person ordinarily prudent would encounter it.

3. **EVIDENCE**—*Conditions of Machines After Accidents.*—Evidence of changes in the condition of a machine the day following the accident should not be submitted to the jury, but its admission is not, as a general rule, reversible error.

Action in Case, for personal injuries. Trial in the Circuit Court of Cook County: the Hon. RICHARD W. CLIFFORD, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed May 22, 1899.

Statement of the Case.—April 28, 1895, appellee, then about thirty-one years of age, an employe as a roustabout of appellants, who were engaged in the business of manufacturing and selling paper boxes, had his thumb and two front fingers of his right hand cut off across the knuckles by a paper cutter operated in appellants' factory by steam power, while he was engaged, under the order of one of appellants, in cutting some paper. A part of appellee's duty was to operate the cutter from time to time, when requested, and he had done so at intervals for some six months prior to his injury. On a trial before the court and a jury he recovered a verdict of \$3,250 and a judgment thereon, from which this appeal is taken.

The declaration alleges that appellants were negligent, in that they operated the paper cutter while the lever and cog-wheel which controlled the application of the steam power to the cutter was in a worn and defective condition, and that by means of such worn and defective condition, plaint-

iff, being inexperienced in mechanics and not familiar with the application of steam power to the cutter, the knife in the cutter was not held in place so as to permit the removal of paper which had been cut, as it should have been, but that the knife would fall before it was intended it should; that appellants did not advise plaintiff of said worn and defective condition, and while he was in discharge of his duty, the knife, without warning, fell on plaintiff's hand and caused the injury, etc.

There is a conflict in the evidence, both as to the care exercised by the appellee in performing his work in the use of the cutter, and as to his knowledge of the alleged defective condition of the cutter, and also as to the negligence of appellants as charged in the declaration.

Evidence was admitted on behalf of appellee, without objection at the time of its admission, that the paper which appellee was cutting at the time of his injury was too wide for the machine (the cutter), and could not be put into it without turning up the edges, and that this paper made it necessary, and that he was so directed by one of appellants when instructed as to the work, to place his thumb and two first fingers within the machine and under the knife while it was stationary, and suspended above the paper, through the automatic action of the machine, in order to withdraw the paper after it had been cut. When the machine was in good order and the knife suspended stationary, the knife could only descend by the movement of a lever, which was usually done by the hand of the operator.

Also against the objection of appellants at the time, the court permitted evidence, by the witness Finn, as to the condition of the cutter on the day following the accident or the day afterward. This evidence was, viz.:

"Q. Now, I will ask you to state to the court and jury in what condition you found that machine?

(Objection overruled and exception by defendants.)

A. Now, it was the following morning or day afterward. It was during that week; I said the following morning; I am not positive it was that morning or the following morning. I went and examined the clutch the first time I had

an opportunity to examine it, and it was the following morning or the day afterward in the morning, that I examined the clutch. I took hold of the clutch and squeezed the dog out before I could throw it into gear. I could not throw it into gear as I did the day I was cutting on it. That is the day I had just to touch the lever and it went into gear. The next time I examined it was in a different condition. I had to squeeze the clutch—the dog out of the lever, before I could throw it into gear. That was a day or two after the accident happened.

Q. How was it the last day on which you worked on it?
A. I did not have to squeeze the dog at all to throw it into gear. It simply went in by touching—the lever was almost on a balance.

Mr. Schuyler: I object to that, and move to have it stricken out.

(Objection overruled and exception by defendants.)

Mr. Wickersham: Now, if that machine was in perfect order and perfect condition, will you tell the court and jury what had to be done in order to set the knife of that machine in operation?

The Court: He may tell how the knife was set.

(Objected to; exception by defendants.)

A. In order to start the knife it was necessary, in the first place, to squeeze out the dog on the lever and lift the lever that throws the cog-wheels together and the knife came down."

At the conclusion of the examination of this witness appellants' counsel moved the court to strike out this evidence, but the motion was overruled, and an exception preserved. On the defense appellants submitted to the jury evidence that the paper which was being cut by appellee was not too wide for the machine, that it went in and out of the machine free, as ordinary stock would go in, with its own weight, and that there was no difficulty in taking the paper out of the machine; also that it was in the same condition after as it was before the accident.

At the close of the plaintiff's case, and at the close of all the evidence, appellants asked the court to instruct the jury to find the defendants not guilty, which motions, respectively, were overruled.

Also at the close of all the evidence, appellants made the following motions:

"First. I move the court to strike out all the evidence of the witness Finn, and other witnesses as to the examination by him of the machine after the accident, and all statements of its condition and any changes that were made in the same, and all evidence by this witness and other witnesses from which it may be inferred or argued to the jury that changes were made in the machine in question after the accident.

Second. I move the court to strike out all the evidence of the plaintiff as to the size and condition of the paper which he was required to cut and was cutting at the time of the accident, and the manner in which the same was handled and manipulated by him, and the effect of the size of the paper upon the operation of the machine, for the reasons:

1st. That the evidence is not admissible under the allegations in the plaintiff's declaration, and that there is a clear variance between this evidence and the allegations in the plaintiff's declaration in this regard; and

2d. That there is no allegation of negligence alleged against the defendants in the plaintiff's declarations of this character or under which this evidence was or is admissible."

These motions were overruled and exceptions preserved.

For appellee the court gave, with another not in question, this instruction:

"If the jury finds, from the evidence, that the plaintiff is entitled to recover, as alleged in his declaration, in estimating the plaintiff's damage, you may take into consideration his physical condition prior to the injury and also his physical condition since the injury, if you believe, from the evidence, that his physical condition since then is impaired as the result of such injury, and that he has been deprived of his ability, since the injury, to earn money; and you may also consider whether or not he has been permanently injured and to what extent; and also to what extent, if any, he has been injured or marred in his personal appearance, and to what extent, if any, he may have borne physical and mental suffering as a natural and inevitable result of such injury; and also any unnecessary expenses he may have been put to in and about caring for and curing himself, and the value of any time you may believe, from the evidence, he has lost on account of such injury, and you may consider what, if any, effect such injuries may have upon him in the future in respect to pain and suffering, or in respect to his power to earn money by his labor; and

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you should allow to him as damages such sum as in the exercise of a sound discretion you may believe, from the facts and circumstances in evidence, will be a fair and just compensation to him for the injury he has sustained."

Appellants also asked, among other instructions, which were given, the following, which were refused, viz.:

XI.

"The court further instructs the jury that although they may believe from the evidence that said machine upon which the plaintiff was working at the time of said accident, or the appliances and machinery by which the same was operated, was out of repair, still, if they shall further believe from the evidence that the defendants had no knowledge or notice of such fact, and that by the exercise of ordinary care they could not have ascertained that such was the fact, or that the plaintiff knew of said defect or defects in said machine, if any there was, or that the plaintiff had equal means with the defendants of knowing and ascertaining that said machine or the appliances and machinery by which it was operated were in a broken, worn and defective condition at the time of said accident, then he can not recover any damages in this case, and the jury must find the defendants not guilty."

XIII.

"The court further instructs the jury to disregard the testimony of the witness Finn, in respect to his examination of the machine in question after the accident, and what he found the condition of said machine to be, and also to disregard the statements of the said witness on his cross-examination that in his opinion the machine was dangerous, or very dangerous."

SCHUYLER & KREMER, attorneys for appellants.

D. J. & D. J. SCHUYLER, JR., attorneys for appellants;
D. J. SCHUYLER, of counsel.

MR. PRESIDING JUSTICE WINDES, after making the foregoing statement, delivered the opinion of the court.

It is contended, first, that appellee knew the condition of the paper cutter and assumed the risk; second, that the evidence fails to show negligence of appellants; third, that

appellee's injury was the result of his own negligence; fourth, that there was error in the admission and exclusion of evidence, and fifth, that there was error in giving and refusing instructions.

First. The evidence is voluminous and conflicting on the questions as to assumed risk, negligence of appellants and appellee. We have examined it carefully and critically, in the light of the able and exhaustive arguments of counsel, and are of opinion that in all three of these respects it presents questions peculiarly for the consideration of the jury. Reasonable and fair-minded men might well reach different conclusions from the evidence on all these questions, and when that is the case it is the duty of the court to submit the case to the jury. *Offutt v. World's Col. Expn.*, 175 Ill. 472, and cases there cited; *McGregor vs. Reid, Murdoch & Co.*, 178 Ill. 464.

A discussion of the evidence in detail and in the line of counsel's argument would unnecessarily extend this opinion and serve no useful purpose. We can not say that the evidence shows that appellee had such a knowledge of the condition of the paper cutter that he knew and appreciated the danger to which he was exposed in its operation, and therefore assumed the risk of injury. It is not sufficient to debar him from recovery that he could see and know the defective condition of the machine, but the danger to him of operating it must have been so open and apparent that no person ordinarily prudent would have encountered it. This was a question for the jury. *Dallemand v. Saalfeldt*, 175 Ill. 310, and cases cited; *Offutt v. World's Col. Expn.*, *supra*, and cases cited; *C. & E. I. R. R. Co. v. Knapp*, 176 Ill. 127.

As to the questions of appellants' and appellee's negligence, the verdict is not, in our opinion, manifestly against the weight of the evidence, and while it may and could reasonably be said that a verdict for appellants on both these questions would not be disturbed by this court, we feel it our duty, after full deliberation, not to disturb the verdict for appellee.

Second. We are of opinion that there is no reversible

error in the admission of the evidence as to the width of the paper and the difficulty of removing it from the machine, because, though no negligence in that regard was alleged, it was part of the *res gestae*, and no claim of negligence in that respect appears to have been made by appellee. Also no objection was made to the evidence at the time it was offered, and no motion was made to exclude it until the close of all the evidence and after appellants had submitted evidence to contradict it. Appellants can not complain of this evidence after having placed before the jury their evidence in opposition.

We think that the evidence as to a change in the condition of the machine the day after or the day following the accident, should not have been submitted to the jury. *Gormully, etc., Co. v. Olsen*, 72 Ill. App. 32, and cases cited; *Marder, Luse & Co. v. Leary*, 137 Ill. 319-23.

But we think it is not reversible error. Appellants' counsel, in his argument, says of this evidence that it "is of the flimsiest character possible, and there is no change in the machine pointed out." Moreover, two witnesses were called by appellants, who testified there was no change made in the machine after the accident, and that it was in the same condition even to the time of trial as at the time of the accident. We can not say, in view of the fact that no change was pointed out, and that two witnesses testified there was no change made, that it is at all probable the jury were misled or that their verdict was to any degree based on appellee's evidence in this respect.

Objection is also made that the court excluded competent and material evidence offered for appellants. We deem it unnecessary to refer to it in detail. There was no reversible error in the court's rulings in this respect.

Third. There is no reversible error in the court's rulings on instructions. As to appellants' instruction complained of, it is said, that the jury were told in estimating appellee's damages, they were not instructed to base their verdict in this regard on the evidence. We think this contention is not tenable when the whole instruction is con-

sidered. The eleventh instruction of appellants was properly refused, because it omits the element of appellee's appreciation of the danger to which he was exposed. *Dallemand*, *Offutt* and *Knapp* cases, *supra*.

What has been said with reference to the evidence of the witness Finn disposes of the alleged error in refusing to give appellants' thirteenth instruction.

There being no reversible error, the judgment is affirmed.

George Miland v. Richard A. Meiswinkel.

1. **EVICITION**—*As a Defense Must be Specially Pleased.*—A defendant can not claim a constructive eviction when his plea sets up a forcible eviction.

2. **CASUALTY**—*Defined.*—A casualty is that which comes without design or without being foreseen.

3. **SAME**—*Existence of—When a Question of Fact—Sewers.*—The question as to whether a sewer was overtaxed by an extraordinary flood of water and was caused to back up and overflow into plaintiff's premises, and thus render them untenable, is a casualty within the meaning of the covenants of a lease providing that in case the premises should be rendered untenable by fire or other casualty, the lessor might, at his option, terminate the lease or repair the same within thirty days, and failing to do so, the term should cease and determine, is one of fact for the jury under proper instructions.

4. **PRACTICE**—*Examination of Witnesses by the Court.*—The examination of witnesses on the trial of a case is the province of counsel, and an orderly and intelligent examination by counsel should not be interfered with by the court without good reasons.

Assumpsit, for rent. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed May 8, 1899.

Statement of the Case.—Appellee brought assumpsit to recover from appellant rent and interest due thereon, for January, February, March and April of 1896, for a flat, store and basement, 1479 Belmont avenue, Chicago,

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demised to him by leases expiring April 30, 1896. The store and basement were used by appellant as a steam laundry and the flat as a dwelling, from about May 1, 1893, to a few days after October 1, 1895, and the rent paid to November 1, 1895.

The leases contained covenants to the effect that appellant had received the premises in good order and repair, and that he would keep the same, including catch basins and adjoining alleys, in a clean and healthy condition, at his own expense; that in case the premises should be rendered untenable by fire or other casualty, the lessor might, at his option, terminate the lease or repair the same within thirty days, and failing so to do, the term should cease and determine.

Appellant pleaded the general issue, and special pleas setting up eviction by force of arms, etc., also that the premises were rendered untenable by a casualty, to wit: The obstruction and stoppage of sewage and filth in a certain catch-basin and sewer pipes, describing how it was done, and that it caused the water, sewage and filth to overflow upon the premises, and averring that appellee did not repair the same within thirty days, whereby the terms of said leases ceased and determined, etc.; also that the premises were rendered untenable by the same casualty, describing it, and that he was prevented from operating his machinery, and was compelled to cease his business, etc., and remove from the premises on account thereof; that he tendered to the plaintiff the keys to and the possession of the premises, which the plaintiff accepted and ever since has and still does retain such possession.

A replication of former adjudication was filed to all the special pleas, to which defendant rejoined, and also a replication taking issue on the pleas of eviction by force and arms, etc.

The only evidence offered by appellee was the leases, and appellant admitted he did not pay rent for the four months in controversy. Appellant then proceeded with the defense, he being the first witness. When appellant's counsel had

asked him two questions, his examination was taken from counsel by the court, without any apparent reason, and the remainder of his examination on the direct, covering eight pages of the record, with the exception of two pages, was conducted by the court. The principal part of the cross-examination of this witness, covering eighteen pages of the record, was also conducted by the court, also without any apparent reason therefor.

No objection by appellant's counsel seems to have been interposed to the action of the court in examining this witness, until the close of the cross-examination, when the witness was describing the effect on the premises of a certain flood, when the following occurred, viz.:

"The Court: How do you know it is the same flood?

A. I didn't say that, your honor—

Q. Well, was it the same flood? A. No, sir.

Q. Well, you had a lot of floods about that time? A. Yes, sir; we had them all the time.

Q. All the time? A. All the time; yes, sir.

Q. Five years of flood—

Mr. Ward: I think I will note an exception to that.

The Court: Yes, strike it out.

Mr. Ward: Note an exception to that in the presence of the jury."

On re-direct examination, appellant's counsel asked the privilege of interrogating him with reference to the time when the flood come into his premises, as tending to explain a matter brought out on the cross-examination by the court, to the effect that it occurred after a scantling, which secured the iron top of the catch-basin, had been been knocked off. Counsel proposed to show that the flooding occurred before, but this was refused by the court. Counsel also asked the court to be allowed to question the witness with reference to certain matters which it was claimed by counsel had been omitted by the court in its examination of the witness. The court refused counsel's request, and also refused to allow counsel to state what were the omitted matters, and peremptorily dismissed the witness from the stand.

The same course, in substance, was pursued by the court with the two remaining witnesses called by appellant. It

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was sought to prove by these witnesses, among other things, that the catch-basins and sewer pipes leading therefrom, which served to drain appellant's premises, but located on other premises occupied by other tenants of appellee, were constructed below the plane or level of the city sewer, with which these catch-basins and sewer pipes were connected, and that by reason of such defective construction, the sewage which had accumulated in those pipes and basins, when the sewer was overtaxed by an extraordinary flood of water, such as occurred in August, 1895, was caused to back up and overflow into appellant's premises, thereby rendering the same untenable, and compelling him to stop his laundry business, and to remove from the demised premises. This evidence was excluded by the court, apparently upon the theory that, under appellant's lease, the trial judge was of opinion it was appellant's duty to repair or reconstruct the catch-basins and sewer pipes, because they received the sewage from his premises, although they were not on his premises nor under his control, and also because, in the court's opinion, a casualty was not proven.

Appellant's counsel preserved exceptions to the various rulings of the court in denying him the right to examine the witness, and also in excluding the evidence mentioned. The evidence that was admitted tends clearly to show that in the latter part of August, 1895, there came an extraordinary downfall of rain—something unprecedented—which caused the sewers and catch-basins on premises owned by appellee and occupied by other tenants of appellee, and near appellant's premises, to overflow and to back up the sewage, filth and slime therefrom into an areaway adjoining the demised premises, and thence through the door of the basement and into his premises, which compelled the stoppage of his laundry machinery, and the foul and noisome odors therefrom permeated appellant's entire premises; that appellant requested appellee, in substance, to remedy the construction of the catch-basins and sewer pipes, to see what could be done with them, which was refused, and appellant, after waiting the lapse of thirty days after such

request and about one week after October 1, 1895, removed from the premises, paid rent therefor to November 1, 1895, sent the keys to appellee, who took them and put a rent sign in the window; also that when appellant told appellee the next day after the flood that something would have to be done or he would have to move out, appellee said, "All right, you can move;" and appellant said, "All right, I will look for another place then."

At the close of the evidence the court refused all appellant's instructions, and instructed the jury to find for the plaintiff and assess the damages at \$262.02, which was done, and the court rendered judgment for plaintiff for that amount, from which this appeal is taken.

GEORGE HUNT and JAMES R. WARD, attorneys for appellant.

The principle upon which a tenant is required to pay rent is the beneficial enjoyment of the premises. An actual physical expulsion by the landlord is not necessary to constitute an eviction of a tenant. The law upholds, when circumstances warrant it, the defense of constructive eviction. *Dyett v. Pendleton*, 8 Cow. (N. Y.) 731.

GREEN, HONORE & PETERS, attorneys for appellee.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

We are inclined to the opinion that the evidence as to a surrender of the demised premises is too uncertain and indefinite in its nature to constitute a defense. There is no evidence as to a forcible eviction. Appellant can not claim a constructive eviction, there being no pleading presenting that defense. The only remaining defense to be considered is as to whether there was shown such a casualty as, under the terms of the leases, rendered the demised premises untenable, and therefore terminated the leases. Webster defines casualty as "that which comes without design or without being foreseen; contingency." He defines contin-

gency as "an event which may or may not occur; that which is possible or probable; a fortuitous event; a chance;" and also says that casualty is synonymous with accident; contingency; fortuity; misfortune.

As we have seen, the court excluded the evidence tending to show the defective construction of the catch-basins and sewer pipes which were located on premises owned by appellee and occupied by his other tenants, and over which appellant had no control, and which he was under no obligation to clean, repair or reconstruct, and also evidence which tended to show that because of such defective construction, sewage which accumulated in these basins and pipes, when the sewer was overtaxed by an extraordinary flood of water, was caused to back up and overflow into appellant's premises, and thus render them untenable. Had this evidence been admitted—which we are of opinion should have been done—it, together with the evidence of the extraordinary flood of the latter part of August, 1895, and the conditions resulting therefrom, would have presented a question for the consideration of the jury, under proper instructions, as to whether there was such a casualty shown as rendered the demised premises untenable, and consequently determined the leases.

The stoppage of the catch-basin by reason of faulty construction, and the coming of the flood which it is claimed caused it to overflow, was, within Webster's definition of casualty, an event which might or might not occur; which was possible or probable; which was a chance. Whether there was a casualty shown, and its effect, was for the jury, and the court erred in directing a verdict for appellee.

The action of the court in denying to counsel the right to examine appellant's witnesses to so great an extent as was done, was error, though not cause for reversal in this case, inasmuch as the case was taken from the jury. Had the case, however, been submitted to the jury, the court's action in this respect was calculated to prejudice the jury against appellant's defense. (*Dunn v. People*, 172 Ill. 595.) The examination of witnesses on the trial is the province of

counsel, and an orderly and intelligent examination by counsel should not be interfered with by the court without good reason therefor, which does not appear, from this record, to have been the case.

The judgment is reversed and the cause remanded.

Sol. Klein, Petitioner, etc., v. Isaac G. Loeber, Assignee.

1. **INVENTORY**—*Purpose of, Under the Insolvent Act.*—The object of the inventory required by the insolvent act is to inform the court and creditors of the property of the insolvent which has come to the knowledge of the assignee, so that the court may act intelligently in relation to it, and creditors may scrutinize it for the purpose of ascertaining whether all property of the insolvent has been inventoried, and, in the event of an order of sale, prospective purchasers may know what is to be sold, and its estimated value.

2. **SALES**—*Order Confirming, Final and Conclusive.*—An order of court confirming a sale under the insolvent act is (in this case) final and conclusive of the purchaser's rights, and until reversed or set aside it can not be impeached by the testimony of witnesses as to statements made during the sale.

3. **COMPROMISE.**—A difference between the parties is a sufficient ground for compromise.

Voluntary Assignments.—Petition for order on an assignee to deliver fixtures. Trial in the County Court of Cook County; the Hon. ORRIN N. CARTER, Judge, presiding. Finding and judgment for respondents; appeal by petitioners. Heard in this court at the October term, 1898. Affirmed. Opinion filed May 22, 1899.

Statement by the Court.—February 21, 1898, the John York Company, a corporation, made a voluntary assignment to Isaac G. Loeber, for the benefit of its creditors. February 28, 1898, the assignee filed an inventory, in the County Court, of the insolvent estate. Certain real estate—being the premises on which was situated a building in which the assignee did business—fixtures and goods and chattels, are described in the inventory; also some accounts receivable. March 1, 1893, the assignee filed a petition in

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the County Court setting forth, among other things, that he had filed an inventory and bond; that the insolvent estate consisted of two pieces of real estate described in the inventory, and of merchandise, fixtures and furniture in the store of the John York Company; that said store had been conducted as a department store, and had twenty departments; that the total amount of the merchandise, as shown by said inventory, was \$88,924.08; that a great part of the same was not salable in spring or summer, and that it would be to the interest of the estate to sell said merchandise in bulk, as soon as possible, before the spring had far advanced, and after reasonable notice to creditors, etc.

The prayer of the petition was for an order directing the petitioner to sell said merchandise in bulk, the fixtures and furniture connected therewith, and the equity in the real estate, which the inventory showed to be heavily incumbered.

March 7, 1898, an order was entered by the court which, after reciting the filing and reading of the petition, proceeds as follows :

“ Ordered that the said assignee be and is hereby ordered and directed to receive bids in open court at the hour of ten o'clock in the forenoon of Saturday, March 12, 1898, for the sale of the stock of merchandise aforesaid as a whole, and also for each of the twenty departments thereof separately and singly; that said assignee forthwith give notice of this order to ten of the leading creditors of said insolvent, and to such other creditors as he can reach, and that said notice state that ample opportunity will be given to all the creditors and others interested to inspect said goods. It is further ordered that said assignee also send a notice of this order to the trade and to such other persons as shall be suggested by any creditor to the assignee or his attorneys. It is further ordered that said bids also include and cover all the furniture, fixtures and personal effects belonging to or used in connection with the business lately conducted by said company. The court reserves the right to reject any and all bids.”

March 12, 1898, an order was entered, by which, after reciting that bids were received in open court, and that the

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bids thereafter mentioned were the highest and best bids, it was ordered and adjudged that the assignee "sell to Solomon Klein, for the sum of fifteen hundred and seventy-five dollars (\$1,575) cash, all the personal property and fixtures mentioned and set forth in the inventory herein, and heretofore used in connection with the business of said insolvent, and to which the assignee now has title, but not including the books of account, accounts or bills receivable," etc.

March 25, 1898, appellant filed, in the County Court, a petition in substance as follows :

"That petitioner had, prior to the sale in the County Court, on the invitation of the assignee, examined the fixtures and furniture used in the store of the insolvent company; that the notice of said sale stated that all of the furniture and fixtures used in connection with the said business would be sold; that when petitioner attended in court at said sale, it was announced by the representative of the assignee that all fixtures used by the insolvent would be offered for sale subject to any rights of the mortgagees, and that it was announced during the sale by the court that the title of the assignee in all of the fixtures used by the insolvent corporation was offered for sale; that no title was guaranteed as against the mortgagees; that the petitioner bid for said fixtures the sum of \$1,575, which amount, on the same day, was paid to the assignee; that the order entered in court directed the assignee to sell to petitioner the personal property and fixtures mentioned and set forth in the inventory and theretofore used in connection with the business of said insolvent, and that the intended purchase and sale was, in fact, a purchase and sale of all the fixtures used by the insolvent corporation. That since the consummation of said sale, the assignee has claimed that the fixtures sold to the petitioner included only such fixtures as were specifically enumerated in a list since given to petitioner, and that the said assignee has refused to allow petitioner to remove certain fixtures properly covered by the sale, and prays that the assignee may be directed to deliver and surrender to petitioner all the fixtures used by the insolvent upon the premises in question, and that the assignee may be directed to execute a supplemental bill of sale conveying the interest of the insolvent in the same terms as used by the assignee and the court at the time of the sale."

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March 28, 1898, appellee answered the petition, neither admitting nor denying the averment as to representations made at time of sale, admitting the receipt from appellant of \$1,575, and that he, the appellee, objected to the removal by appellant of any articles not covered by the order of sale.

April 4, 1898, appellant filed a supplemental petition, averring that at the time of filing the original petition appellant informed him that he, appellee, was not entitled to any articles not enumerated in the inventory; that since said time appellant had caused an accurate list to be made of the fixtures on the premises not specified in the inventory, and had demanded of the assignee leave to remove the same, but the assignee refused; that each of the articles enumerated in said list is a trade fixture, formerly used by the insolvent on the premises in connection with the carrying on of its business of a general merchandise store, and that each of the said fixtures can be removed without injury to the real estate, and is not so annexed to the freehold as to become part thereof; that the alleged inventory filed on February 28, 1898, was not a full and perfect inventory, and that many of the articles mentioned in the exhibit attached to said supplemental petition are not mentioned in said inventory, although coming within the description of the property purporting to be set forth in said inventory, and that many of the articles mentioned in said inventory; were not upon the premises of the said insolvent company, so far as diligent search on the part of petitioner has disclosed; that many of the articles mentioned under "fixtures" in said inventory have not been shown to petitioner by the assignee, nor has he been able to discover the same, nor has the assignee disclosed the same to petitioner, or delivered them to him. Prays that the assignee may be directed to allow petitioner to remove the articles described in the list annexed to the supplemental petition, subject to any rights that mortgagees may have in said premises.

List attached to petition includes a long list of shelving, tables, etc.

The Northwestern Mutual Life Insurance Co. filed an answer, setting up a mortgage for \$70,000 of certain real estate described in the inventory, denying appellant's right to the relief prayed, and praying a determination by the court as to what part of the fixtures were covered by its mortgage.

July 25, 1898, the court heard the cause on the pleadings and evidence produced in open court, and found that appellant was not entitled to any fixtures not specifically enumerated in the inventory theretofore filed by the assignee, and denied the petition.

William Wilhartz, called by appellant, testified that he bid for appellant; that the court and Kerr, appellee's attorney, both stated at the time the bids were being made that all the fixtures used by the John York Company were to be sold subject only to the rights the mortgagees might have in the premises, and that in making said announcement the court made no reference to the inventory of the fixtures. The witness testified that the sale of the merchandise preceded the sale of the fixtures, and on cross-examination he testified:

"The inventory was brought up before the sale, and Judge Carter had it and referred to it in making the sale of the merchandise, but I didn't hear anything about it when the fixtures were being set off."

Appellant testified: "It was said that the fixtures of the John York Company would now be sold; that means all the fixtures used in connection with that business—worded to that effect." He further testified that his partner asked the court whether the fixtures included "all the wagons and the horses," and the court said, "Yes, sir; it was all the horses and wagons and all the fixtures connected with the John York Company, used in that business."

Alfred E. Barr, attorney for appellee, testified that in the afternoon after the sale he, Leon and Solomon Klein, a Mr. Prindiville, Loeber, the assignee, and some others, were at the York Company's store; that the merchandise which was purchased by Leon Klein was first delivered;

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that then appellant claimed everything else in the place, to which witness demurred, when Wilhartz, who bid for appellant, said: "There is no use in having any dispute about this matter. I have got the inventory here, and if we get the things named in this inventory that is all we want." "I said, 'Very well, that is satisfactory,'" that thereafter there was no dispute, except as to two show cases which, in checking off articles from the inventory, were temporarily passed; that when everything else in the inventory had been checked off, witness asked appellee what he wanted to do about the two show cases, saying they were the only matters in dispute, when appellee said he would waive any question as to them; that witness told this to appellee and Wilhartz, saying: "Now, having done this, is everything satisfactory?" and they said, "Now we are satisfied." Klein said: "I don't give a d—n for the rest of the things anyway." This witness identified, and there was put in evidence, a paper which he said he had referred to in his evidence as the inventory. The paper contains a long list of articles, and indorsed on it is this receipt:

"CHICAGO, March 12, 1898.

Received from Sol. Klein fifteen hundred and seventy-five dollars (\$1,575) in payment of the within described property, as per order of court this day entered in the County Court of Cook County, Illinois, in the matter of the estate of John York Company, insolvent.

ISAAC G. LOEBER,

Assignee."

Barr's testimony is corroborated by that of appellee and also by that of Prindiville. Prindiville says: "Mr. Loeber, before accepting the money, wanted to know if they were perfectly satisfied with the list, and they said, yes." The original inventory was also put in evidence.

Wilhartz, in rebuttal, testified that his recollection of the understanding was, that when they got through checking Barr said to him, "Well, if we let you have these two cases will you waive any rights with reference to the shelves and those bins up in the grocery department?" and that he, witness, conferred with Klein, and they told Barr that if he

would let them have the cases they didn't care anything about the shelves. This witness drafted the receipt above mentioned. He testified that there were some tables and other stuff not in the list, and that he said: "Now, see here, we agreed to this; what about these tables? What about this other stuff that is not attached to the building, and which, certainly, the mortgagee can not claim?" and that Barr said, "Oh, that's all right, you sign that and there won't be any trouble about these tables, or anything of that sort." "I didn't say at any time that we would be satisfied to take the articles in the list. The conversation about the tables was private between Barr and myself."

Barr, recalled, testified that he had no recollection of any conversation with Wilhartz about tables.

STEIN & PLATT, attorneys for appellant.

KERR & BARR, attorneys for appellee.

HOYNE, FOLLANSBEE & O'CONNOR, attorneys for The Northwestern Mutual Life Ins. Co., appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

The propositions of appellant's counsel on which they rely for a reversal of the judgment of the County Court are: First, that the sale was of all the fixtures and furniture used prior to the sale in connection with the stores and business of the insolvent, and that the sale was not limited to articles mentioned in the inventory. Second, that if, as testified by appellee's witnesses, appellant agreed that if he was allowed to take the two show cases he would be satisfied, such agreement was without consideration, as the show cases were mentioned in the inventory.

Appellee, in the commencement of his petition for leave to sell, refers to the inventory, and concludes his petition by praying for an order authorizing him to sell said merchandise, the fixtures and furniture connected therewith, and the equity in the real estate and accounts receivable which are set forth in said inventory. The object of the inventory required by the statute is to inform the court and

creditors of the property of the insolvent which has come to the knowledge of the assignee, so that the court may act intelligently in relation to such property, that creditors may scrutinize the inventory for the purpose of ascertaining whether all property of the insolvent has been inventoried, and that, in the event of an order of sale, prospective purchasers may know what is to be sold, and its estimated value. The court can not intelligently order a sale of the property of an insolvent in ignorance of what the property is. In the present case the court could only obtain knowledge of the property from the inventory to which appellant's petition referred, and it must be presumed that the order of March 7, 1898, authorizing the assignee to give notice that bids would be received for "the furniture, fixtures and personal effects belonging to or used in connection with the business lately conducted by said company," refers to the furniture, fixtures and personal effects mentioned in the inventory. That this was the view of the County Court is evidenced by the order of March 12, 1898, confirming the sale to appellant, which order is, "That he sell to Solomon Klein, for the sum of fifteen hundred and seventy-five dollars (\$1,575) cash, all the personal property and fixtures mentioned and set forth in the inventory herein, and heretofore used in connection with the business of said insolvent," etc. The language following the words "in the inventory herein" is used conjunctively with those words, and does not extend the meaning beyond that expressed by them, because the personal property and fixtures mentioned in the inventory were formerly used in connection with the business of the insolvent. That the understanding of the court was that only the articles mentioned in the inventory were offered for sale, is further evidenced by the testimony of appellant's witness, Wilhartz, who testified that the inventory was brought up before the sale was commenced, and that Judge Carter, the presiding judge, referred to it. The inventory was filed February 28th, the sale took place March 12th; the inventory was then in court; all persons interested had ample opportunity to examine it, and if they did not, it was their own fault.

The testimony of Wilhartz, who acted as appellant's agent in bidding for him, shows that he saw the inventory before bidding for the stock of merchandise on behalf of Leon Klein, which was prior to his bidding on behalf of appellant.

The proceeding in reference to the assignment was a chancery proceeding (*Union Trust Co. v. Trumbull*, 137 Ill. 146, 159), the court had expressly reserved the power to reject any and all bids, and we are of opinion that the order of March 12th, confirming the sale to appellant, is final and conclusive of appellant's rights in the premises till reversed or set aside, and that it can not be impeached by the testimony of witnesses as to statements made during the sale. A court speaks only by its record. *Tynan v. Weinhard*, 153 Ill. 598.

If the petition is to be regarded as, in substance, a petition to modify the order of confirmation of the sale, and if, in view of our holding that the sale was made with reference to the inventory, it could be modified, we are of opinion that the court was fully justified by the evidence in denying the petition.

The second proposition is, that appellant's agreement to take the show cases by way of compromise was without consideration, because they were mentioned in the original inventory. There was a dispute between the parties which, as appears from the evidence, both parties thought sufficiently serious to be submitted to the court in the event they could not agree, and this difference was sufficient ground for a compromise, if compromise were necessary. But no compromise was necessary on the part of appellee, because the sale to appellant was of the personal property and fixtures inventoried, and it is not claimed that he did not receive all the personal property and fixtures inventoried.

The judgment will be affirmed.

American Trust & Savings Bank v. Crowe & Gillen (a Corporation).

1. **CHECKS**—*What is Not a Defense to an Action on.*—The fact that a party obtained the possession of a check from the payee by false representation is no defense to the same in the hands of a person without knowledge of the transaction.

2. **SAME**—*Certification—Evidence of, etc.*—Where a bank certifies a check, it is manifest that the bank has sufficient funds of the drawer at the time of the certification on deposit to pay it, and the transfer of the check carries with it, as against the bank, title to the amount named in it.

3. **ULTRA VIRES**—*Question of, Can Not Be Raised for the First Time in the Appellate Court.*—The question of *ultra vires* is one of law, and can not be raised for the first time in the Appellate Court.

Assumpsit, on a certified check. Trial in the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding. Verdict and judgment for plaintiff: appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed May 8, 1899.

L. H. CRAIG, attorney for appellant.

W. R. HAUZE, attorney for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment rendered in favor of the appellee, a corporation, against appellant, on a check for \$125 drawn on appellant and by it certified. The check, dated March 31, 1898, was drawn by Maggie Seass, payable to the order of Lucas Seass, indorsed by him and Guy H. Powell, and when put in evidence had stamped on the back the impressions, "Henry L. Turner & Co." "Paid through Chicago Clearing House, April 2, 1898, to Merchants National Bank." Across the face of the check was the stamped impression, "Accepted, payable through the Chicago Clearing House." "American Trust and Savings Bank, per J. B. Snell." The evidence was that the acceptance or certification of the check occurred between March 31, 1898, and April 2, 1898. The secretary of the appellee testified that

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Guy H. Powell brought to him the check certified, and requested him to cash it; that not having the money on hand, he took the check to the bank of Henry L. Turner & Co., with which bank appellee did business; that the bank cashed it for the appellee, and he, the secretary, paid the money to Powell, and that, subsequently, he went to the appellant and presented the check for payment, when he was informed that payment had been stopped. Henry L. Turner & Co. charged to appellee the amount of the check, and when appellee learned that payment had been stopped, it returned that amount to Turner & Co.

At the close of appellee's case appellant's attorney made a lengthy statement of facts, which he offered to prove, the substance of which is that Guy H. Powell obtained the check from Lucas Seass, the payee, by falsely representing that certain papers delivered by Powell to said Seass were a transfer to him, Seass, and one Anson, of the charter of a corporation; also that Seass was the owner of the check. This was all the evidence offered by appellant. The court correctly held that the facts, if proved, would constitute no defense. The indorsements showed appellee to be the legal owner. Lucas Seass, the payee, indorsed the check to Powell, and the latter, for a valuable consideration, indorsed it to appellee. If Powell procured the check from the payee by means of false statements in reference to the legal effect of the papers delivered by him to the payee, of which, so far as appears from the evidence or any offer of proof made, appellee knew nothing, this constitutes no defense on the part of the appellant bank.

It is manifest from the certification of the check that appellant, when it certified it, had sufficient funds of the drawer to pay it, and the transfer of the check to appellee carried with it, as against the bank, title to the amount named in the check. Bank v. Banking Co., 114 Ill. 483.

The object of appellee's incorporation was to engage in the restaurant and buffet business, and appellant's counsel contends here that the cashing of the check by appellee was *ultra vires*, although it does not appear from the motion

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made in writing for a new trial, or otherwise, that this objection was made in the trial court. The question is one of law, and can not be raised here for the first time; but even though it could, it would not avail appellant. The judgment will be affirmed.

North Chicago St. R. R. Co. v. Henry Hoffart, by his Next Friend.

82	539
89	326
82	539
99	570
82	539
105	169

1. NEGLIGENCE—*A Question of Fact.*—The question of negligence is one of fact for the jury.

2. VERDICTS—*The Result of Passion and Prejudice.*—A judgment based upon a verdict rendered by a jury improperly influenced by motives of prejudice, passion or sympathy, or a verdict the result of a misconception of the evidence, will be reversed.

3 SAME—*Errors not Cured by a Remittitur.*—To hold that a remittitur cures all the defects in a verdict manifestly the result of improper motives or influence, is to substitute, in effect, the opinion of the trial court and of this court for the verdict of the jury.

Action in Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. ELBRIDGE HANECY, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed May 8, 1899.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

We submit that a verdict so grossly excessive that seven-ninths must be remitted must be the product of prejudice or passion, and that the portion remaining is vitiated as well as the portion remitted. Ill. Cent. R. R. Co. v. Ebert, 74 Ill. 399; Loewenthal v. Streng, 90 Ill. 74; C. & N. W. Ry. Co. v. Cummings, 20 Ill. App. 333; West Chicago St. R. R. Co. v. Johnson, 69 Ill. App. 147.

HOFHEIMER & PFLAUM, attorneys for appellee, contended that the courts have sustained verdicts for larger amounts where the injuries were not so severe. In Lake Shore &

Michigan Southern R. R. Co. v. Hundt, 41 Ill. App. 220, this court held \$7,500 was not excessive for the loss of three fingers. In North Chicago Street R. R. Co. v. Broms, 62 Ill. App. 127, this court held \$3,500 was not excessive where the evidence shows the tip of plaintiff's thumb was cut off.

In Ill. Central R. R. Co. v. Cole, 62 Ill. App. 480, this court held that \$5,000 was not excessive for an injury to a healthy man, forty-one years of age, a railroad engineer, which consisted of a scalp wound five inches long, a varicose condition of the veins of one leg and pain in the back. This, although he was disabled only four months, and has since regularly pursued his same employment, with no loss of wages. In Illinois Central R. R. Co. v. Harris, 63 Ill. App. 172, this court held \$8,000 not excessive for the loss of a hand. In Chicago City R. R. Co. Wilcox, 33 Ill. App. 450, this court held \$15,000 not excessive for the loss of a leg of a boy six years old. In Pennsylvania Co. v. Backes, 35 Ill. App. 375, this court held \$6,000 not excessive for the loss of an arm. In Chicago & Alton R. R. Co. v. Fisher, 38 Ill. App. 33, this court held \$16,000 not excessive where the evidence showed that the lower portion of one limb was partially paralyzed and that he was lame. In the case of the North Chicago Street R. R. Co. v. Eldridge, 51 Ill. App. 430, this court, in sustaining a judgment for \$10,000 after a remittitur of \$3,500, said:

"It is well settled, both in this court and in the Supreme Court, that judgments in case of this character will not be disturbed on the ground that the damages are excessive unless it is manifest that the verdict was against the evidence and is attributed to passion and prejudice on the part of the jury."

MR. PRESIDING JUSTICE WINDES, delivered the opinion of the court.

July 10, 1895, appellee, who was then two years and five months old, was run over by appellant's electric motor car at North avenue and Mohawk street, which resulted in the amputation of the third and fourth fingers of his right hand, and his left leg was so badly injured that he was con-

fined to his bed three months, and thereafter until about the middle of December, after the accident, this leg had to be supported by a wooden frame. At the time of the trial in April, 1898, he could walk, as his mother testified, "All right, but a little bit lame on the left foot." A trial before the court and a jury resulted in a verdict of \$9,000 for appellee, from which there was a remittitur of \$7,000, and a judgment for \$2,000. The negligence alleged was that appellant, by its servants, "improperly and negligently drove and managed" the car which caused the injury.

The evidence as to appellant's negligence is conflicting, but sufficient, in our opinion, to justify the submission of the case to the jury. The details given by the various witnesses need not be stated nor discussed. Some of appellee's evidence tends to show that appellee, who was no more than a toddling babe, started across the street in plain view of the motorman, the car going slowly—one of the witnesses says, at the usual rate of speed—from fifty to one hundred feet away and crossed the tracks on which the car was within ten feet of the moving car, and when three or four feet past the tracks he turned back and was then run down by the car, and that by the exercise of ordinary care on the part of appellant's motorman the accident might have been avoided. This evidence is to some extent corroborated by some testimony on behalf of appellant. The motorman testified that he saw the child when it left the curb, and that it ran in front of his car, crossed the track and then turned back. This being in evidence there was no error in the court's refusing to instruct a verdict for appellant. On this point we do not regard the case of *Rack v. Chicago City Ry. Co.*, 173 Ill. 289, relied upon by appellant, as conclusive or as directly applicable to the facts of the case at bar.

In the case of *Chicago W. Div. Ry. Co. v. Ryan*, 131 Ill. 474-9, which is analogous in its facts to the case at bar, as to the negligence of appellant, it was held that the question of negligence was one of fact for the jury.

Nor can we say, from a careful examination of the evidence, that the verdict on this question is manifestly against

the evidence. We do not discuss it in this respect, as there may be another trial. In view of the injuries to appellee, the amount of the verdict and the remittitur made, we can reach no other conclusion than that the jury were improperly influenced by motives of prejudice, passion or sympathy, or that there was misconception of the evidence on their part, or that the verdict was the result of all these combined. The remittitur does not cure the verdict and make it a support for the judgment. To so hold would, in our opinion, be to substitute, in effect, the opinion of the learned trial judge and our opinion for the verdict of the jury. This we can not legally and rightfully do in a case where the verdict is so manifestly the result of improper motives or influence as this one is. *C. & E. R. R. Co. v. Binkopski*, 72 Ill. App. 22, and cases there cited; *C. & E. I. R. R. Co. v. Cleminger*, 77 Id. 186; *Loewenthal v. Strong*, 90 Ill. 74.

The judgment is reversed, and the cause remanded.

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82	498
83	617

Walter S. Cramblet v. The Chicago & N. W. Ry. Co.

1. **NEGLIGENCE—*Prima Facie Case—Shifting the Burden of Proof.***—In a suit by a passenger against a carrier for an injury, the mere proof of the accident by which the injury was occasioned is sufficient to throw the burden on the carrier to show that he exercised due care.

2. **SAME—*Inferences—Absence of Vis Major.***—When there is an absence of *vis major*, and it is shown that the injury happened from the abuse of agencies within the defendant's power, it will be inferred from the mere fact of the injury that he acted negligently.

Action in Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Verdict and judgment for defendant by direction of the court; appeal by plaintiff. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed May 8, 1899.

E. E. OSBORN, attorney for appellee; LLOYD W. BOWERS and A. W. PULVER, of counsel.

The plaintiff having by his pleading planted himself upon the claim that the negligence complained of consisted in

carelessly and improperly attaching a lantern to the back of the rear car, he can not recover upon any other theory. Price v. R. Co. (Mo.), 3 A. & E. R. R. C. 365; R. Co. v. Wright, 49 Neb. 456, and cases there cited.

F. S. McELHERNE and A. B. MELVILLE, attorneys for appellant, contended that the rule arising out of the maxim *res ipsa loquitur*, shifting the *onus probandi* from plaintiff to defendant, applies to this case. That the plaintiff made a *prima facie* case such as required rebuttal on the part of the defendant and that the defendant having failed to introduce any exculpatory or explanatory evidence, in fact having demurred to the evidence, the court should have allowed the case to go to the jury.

Conceding that carriers of passengers are not insurers against injury as in the case of carriers of goods (except as against the acts of God, etc.), and that as a general rule the burden of proof is upon the plaintiff, in personal injury cases, to show negligence on the part of the defendant, yet the doctrine *res ipsa loquitur* (the thing speaks for itself, or rather literally, the thing itself speaks) and out of which arises the rule that under certain circumstances (both in actions resting in contract and in tort) "the very nature of the accident or transaction may itself and through the presumption it carries supply the desired proof" (Whart. on Neg., Sec. 421), is a doctrine that passed down to us as part of the common law of England, and though the cases to which the rule is applicable have in no part of the world been of frequent occurrence, yet it has ever been the law of this land.

It is only as it applies to actions in tort that we have to deal with it in this brief, of course, and in this field it applies in those personal injury cases in which the circumstances of the accident constitute such *prima facie* evidence of negligence as will shift the *onus probandi* to the defendant to show by exculpatory or explanatory evidence that he is not guilty of the negligence thus presumed.

Referring to English cases, we find that in *Byrne v.*

Boadle, 2d Hurlst & Cole, 722, the court held that the falling of a barrel of flour from a window upon a pedestrian below constituted sufficient *prima facie* evidence of negligence for the jury to cast on the defendant the *onus* of proving that the accident was not caused by his negligence.

Where the injury was caused by six bags of sugar falling down upon the plaintiff "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." *Scott v. London & St. Docks Co.*, 3 Hurlst & Cole, 596; *Kearney v. London B. & S. C. R. Co.*, L. R. Q. 5, Q. B. 411.

Where a brick had fallen from the wall of a railroad bridge upon the plaintiff while passing along the highway under the bridge, and where there was no positive evidence as to what caused it to fall, the Court of Queen's Bench held that it was a case in which the maxim *res ipsa loquitur* was applicable, and that there was a *prima facie* case of negligence, and upon appeal to the higher court, the judge delivering the opinion said: "We are all of the opinion that the judgment of the Queen's Bench must be affirmed. The Lord Chief Justice in the court below said *res ipsa loquitur*, and I can not do better than refer to that judgment," etc.

Where plaintiff was pushed from the door of a building in which defendant had offices, by the latter's servant, who was watching a packing case belonging to his master, and which was leaning against the side of the building, the plaintiff falling and the packing case falling upon and injuring his foot, and although there was no evidence as to who placed the packing case against the building or what caused it to fall, the court held that there was a *prima facie* case against the defendant to go to the jury. *Briggs v. Oliver*, 4 Hurlst & Cole, 403.

Such is the law of England in reference to the doctrine *res ipsa loquitur* as applied to personal injury.

Now, passing from England to this country, we find that as our courts were called upon for the first time to pass upon this doctrine they, without the exception of a State, adopted the law of England as above stated and declared it to be the law of this country.

In *Augusta & S. R. Co. v. Randall*, 79 Ga. 304, and wherein the constitutionality of a certain section of the Code was under consideration, the court said: "This presumption that where the plaintiff has shown that he was a passenger, and was hurt or damaged by the running of the railroad company's trains or machinery, the company was negligent is a common law presumption—and has been the law of England and this country all the time."

Where the relation of passenger and carrier existed and where the passenger's arm was broken while protruding from the window of the car, by striking a bridge, the court said: The mere happening of an injurious accident raises *prima facie* presumption of neglect and throws upon the carrier the *onus* of showing it did not exist. *Laing v. Calder*, 8 Pa. St. 479, 49 Am. Rep. Dec. 533. So where a passenger was injured by a bar projecting from a passing construction train. *Walker v. Erie R. Co.*, 63 Park, 260.

The case of *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530, was not only the first New York case in which this doctrine is passed upon, but is considered one of the leading cases in this country upon this question. Here the injury of the plaintiff, who was upon the sidewalk, was caused by the falling wall of a building in the absence of any special circumstances of storm and violence. The court said: "There was some evidence tending to show that it was out of repair. Without laying any stress upon the affirmative testimony, it is as impossible to conceive of this building so falling unless it was badly constructed or in bad repair as it is to suppose that a seaworthy ship would go to the bottom in a tranquil sea and without collision. The mind necessarily seeks for a cause for the fall. This appar-

ently is the bad condition of the structure. This again leads to the inference of negligence which the defendant should rebut."

Where some object scraping along the side of the car injured a passenger's arm, as it rested upon the sill of an open window, it was held that there was presumption of negligence on the part of the railroad company. *Holbrook v. Utica & S. R. Co.*, 12 N. Y. 236, 64 Am. Dec. 502, affirming 16 Barb. 113. And where a passenger was injured by a swinging door of a passing freight car. *Breen v. N. Y. C. & H. R. R. Co.*, 11 Cent. Rep. 891.

Where a seaman working on the deck of a vessel was injured by iron ore falling from a bucket attached to a crane upon defendant's vessel, which was being unloaded at the time, the court said: "The accident itself was of such a character as to raise a presumption of negligence, either in the character of the machinery used, or in the care with which it was handled; and as the jury found that the fault was not with the machinery, it follows that it must have been with the handling, otherwise there is no rational cause shown for its happening. *Cummings v. National Furnace Co.*, 60 Wis. 603.

The fall of a roof, which slipped or tipped to one side while being raised by jack screws, creates a presumption of negligence in failing to brace or stay it sufficiently, and in the absence of explanatory proof will sustain a recovery for the resulting death of an employe against the one whose duty it was to see that the roof was properly braced. *Bar-nowski, Adm'r, etc., v. Helson*, 15 L. R. A. 33.

In the recent case of *Howser v. Cumberland & Penn. R. Co. (Md.)*, 27 L. R. A. 154, where plaintiff while walking near right of way of defendant was struck by ties sliding from a passing freight car, the court say: "Thus when the circumstances are of such a nature that it may be thoroughly inferred from them that the reasonable probability is that the accident was occasioned by the failure of appellee to exercise proper caution, which it readily could and should have done, and in the absence of satisfactory explanation on

the part of appellee, a presumption of negligence arises against it.”

In Illinois, this rule, arising out of the doctrine *res ipsa loquitur*, and shifting the burden of proof from plaintiff to defendant in certain classes of personal injury cases, was held to be in force in this State at an early day. *G. & C. U. R. R. Co. v. Yarwood*, 15 Ill. 468, 17 Ill. 509. See also *Sack v. Dolese et al.*, 137 Ill. 129; *G. & C. U. R. R. Co. v. Fay*, 16 Ill. 558; *Lavis v. W. C. R. R. Co.*, 54 Ill. App. 636; *P., C. & St. L. Ry. Co. v. Thompson*, 56 Ill. 138; *P. P. & J. R. R. Co. v. Reynolds*, 88 Ill. 418; *Eagle Packet Co. v. Defries*, 94 Ill. 598; *North Chicago St. Ry. Co. v. Cotton*, 140 Ill. 486; *Atchison, T. & S. F. R. R. Co. v. Elder, etc.*, 50 Ill. App. 276; *I. C. R. R. Co. v. Phillips*, 49 Ill. 234; 55 Ill. 194; *Howser v. Cumb. & P. R. R. Co. (Md.)*, 27 L. R. A. 154.

The following recent and leading cases from other States serve to show the trend of the decision establishing this doctrine as the universal law in this country. *Barnowski v. Helson (Mich.)*, 15 L. R. A. 33 (decision 1891); *Thomas v. Phil. & R. R. Co. (Pa.)*, 15 L. R. A. 416 (decision 1892); *Hendrickson v. G. N. R. R. Co. (Minn.)*, 16 L. R. A. 267 (decision 1892); *Spellman v. L. R. Tran. Co. (Neb.)*, 20 L. R. A. 316 (decision 1893); *Fredericks v. N. C. R. R. Co. (Pa.)*, 22 L. R. A. 306 (decision 1893); *Carrico v. W. Va. R. R. Co. (Va.)*, 24 L. R. A. 50 (decision 1894); *Howser v. Cumb. & P. R. R. Co. (Md.)*, 27 L. R. A. 154 (decision 1894); *Budd v. Carriage Co. (Ore.)*, 27 L. R. A. 279 (decision 1894).

MR. JUSTICE ADAMS delivered the opinion of the court.

The appellant, March 9, 1894, became a passenger on appellee's train at Ravenswood in this county, to be carried thence to Chicago. Appellee's terminal depot in Chicago is at Fifth avenue. Appellant testified as follows:

“When the train drew near Clinton street I stepped to the door and stood there, on the inside of the door, until the train stopped. When the train stopped at Clinton street I then stepped out of the door onto the platform and down onto the lower steps with the intention of getting off, when

I noticed a passenger train backing out on that side. I turned my head and was in the act of going back, stepping back to get off on the other side, and before I could do so—before I had a chance to step back—a large lantern fell from above, which lantern—I believe they are commonly called ‘bull’s eye,’ a heavy lantern which is attached on the end of the rear of the car—fell down, striking me on the nose, cutting my nose open and knocking me back across the edge of the first step, bruising me in the side and injuring my nose; cutting it open.”

He further testified that the lantern was attached to the rear end and close to the side of the car. This testimony of appellant is corroborated by that of another witness. There is not a regular station at Clinton street, but the evidence is that the train stopped there. One of appellant’s witnesses testified that the incoming trains always stop at Clinton street, and that a great many people got off there. This evidence was stricken out by the court, erroneously, as we think, but, as no exception was taken to the striking out of the evidence we can not consider it. The evidence tends to prove that appellant was injured. At the close of appellant’s evidence appellee’s counsel moved the court to take the case from the jury, which motion the court overruled and directed counsel to proceed with the argument, but after counsel for appellant had concluded his opening argument, and counsel for appellee had commenced his argument, the following occurred:

The court: “I think I shall have to interrupt you. Neither mechanics nor nature has reached a point at which accidents can not happen. There must be some proof tending to show why this lamp fell; there must be some proof that it was insecurely fastened. I do not think the mere falling of a lamp is proof of negligence; somebody might have bumped against it; it does not even appear that anything was broken. I think I will give an instruction. The jury are instructed to find the defendant not guilty.”

The jury returned a verdict as directed, a motion for a new trial was made by appellant and overruled, and judgment was rendered on the verdict.

The remarks of the court will be better understood by

referring to the statement in the declaration of the cause of the accident, which is as follows:

"That while plaintiff was passing through said car across the car platform onto the ground in the proper and correct manner, and before he had reached the ground, and while the plaintiff was using all due care and caution for his own safety, a large and heavy lamp known as a 'Bull's Eye,' which had been by the defendant negligently and carelessly attached to the rear end of the said train, from which this plaintiff was about to alight, fell from its fastenings because of the negligence of the defendant in carelessly and improperly attaching and maintaining said 'bull's eye' on the back of the rear car, down upon the plaintiff, striking him in the face, bruising and cutting plaintiff's face," etc.

The court was evidently of opinion that from the falling of the lamp the jury could not legitimately infer that it was negligently and insecurely attached to the car, and that there must be some direct affirmative proof of that fact, and so appellee's counsel contend.

Counsel for appellee argue that the meaning of the averment of the declaration quoted *supra*, is that there was negligence in the mere act of keeping a bull's eye (meaning the lamp) in the place where it was. We do not so understand the averment. The negligence averred is the carelessly and negligently attaching the lamp to the car. The language is that it "fell from its fastenings, because of the negligence of the defendant in carelessly and improperly attaching and maintaining said bull's eye," etc. Counsel also argue on the hypothesis that the train was moving at the time of the accident. The evidence is that the train stopped at Clinton street, and appellee's attorney stated on the trial that appellee's trains are compelled to stop there because of the crossing of the C., M. & St. P. tracks. On the hypothesis that the train stopped at Clinton street and, as appellee's attorney substantially admitted, always stops there, we do not understand counsel to contend that appellant in going onto the platform, for the purpose of alighting from the train, was guilty of negligence as matter of law, and we think it clear that he was not. *Penn. Co. v. McCaffrey*, 173 Ill. 169.

But counsel contend that to warrant a recovery there must have been direct affirmative evidence that the lamp was negligently and insecurely attached to the car; that this can not be legitimately inferred from the fact that it fell. Counsel seem to admit that, under a general averment of negligence, proof that the appellant was a passenger, and was injured while in the exercise of ordinary care, would make a *prima facie* case of negligence on the part of appellee and shift the burden of proof to appellee; but that specific negligence being averred, viz., the careless attachment of the lamp to the car, direct and specific proof must be made by appellant of the specific negligence averred. The same point seems to have been made in N. C. St. R. R. Co. v. Cotton, 140 Ill. 486. In that case, the court say: "In many cases it has been held that in a suit by a passenger against a carrier for an injury, the mere proof of the accident by which the injury was occasioned is sufficient to throw the burden on the carrier to show that he exercised due care, and there seems to be a very general concurrence of authority that, when there was an absence of *vis major*, and it is shown that the injury happened from the abuse of agencies within the defendant's power, it will be inferred from the mere fact of the injury that the defendant acted negligently." After citing cases in support of this proposition, the court proceeds thus: "But it seems to be contended that, even admitting that a presumption of negligence arises from mere proof of the plaintiff's injury and its cause, it does not follow that there is any presumption of the specific negligence alleged in the declaration. Even if it be admitted that the presumption is one of negligence generally, and not of any specific negligence, we think it sufficient to throw upon the defendant the burden of rebutting the specific negligence alleged." In the present case the lamp, or bull's eye, was in the control and management of appellee; it was placed where it was by appellee's servants. The uncontradicted evidence is that it fell. There is no pretense that its fall was caused by *vis major*. The proof, we think, was clearly sufficient to cast on appellee the burden of disproving negligence, and that

Fish Furniture Co. v. Jenkins.

in the absence of such proof the jury would have been justified in finding that it fell because of having been carelessly and improperly attached to the car.

In *White v. B. & A. R. R. Co.*, 144 Mass. 404, the evidence was that a porcelain shade fell from the top of the car on the face of the plaintiff, a minor about four years of age, and injured her face. This was substantially all of the evidence. The court say :

“The contention of the defendant is that there was not sufficient evidence of that fact; and that it did not appear that the accident was not caused by the act of a stranger, or by some external force from which the defendant was not responsible. We think that the question was for the jury, and that they were authorized to infer from the situation of the fixture, from the absence of evidence of any other cause of the accident, and the probability that there would have been such evidence had such cause existed, and from all the attending circumstances in evidence, that the accident must have been caused by the insufficiency of the fixture. It was not necessary that the evidence should show that it was impossible that there should be any other cause; it was sufficient if it satisfied the jury that there was none.”

Numerous other authorities might be cited on the doctrine of presumption from facts similar or analogous to those in the present case, but the law on the subject is familiar to practitioners, and we think further citation is unnecessary. We are of opinion that the court erred in taking the case from the jury; therefore, the judgment will be reversed and the cause remanded.

Fish Furniture Co. v. Alice J. Jenkins.

1. *PRACTICE—Entry of Orders After the Term.*—Orders vacating a judgment and for a new trial, entered at a term subsequent to that at which the judgment is entered, are void.

Appeal, from the County Court of Cook County; the Hon. R. W. S. WHEATLEY, Judge, presiding. Heard in this court at the October term. 1898. Reversed and remanded, with directions. Opinion filed May 8, 1899.

Statement of the Case.—This cause was pending in the County Court upon an appeal from the judgment of a justice of the peace. Upon December 20, 1897, which was of the December term of the County Court, the cause was called for trial, and appellee, the plaintiff in the suit, appearing, a jury trial was had in absence of appellant, the defendant there, and a verdict and judgment resulted in favor of appellee. On January 15, 1898, which was of the next January term of the court, an order was entered purporting to vacate the judgment of December 20th, and ordering that the defendant (appellant) pay costs. On March 26, 1898, an order was entered that defendant (appellant) pay the amount of \$17.75 costs in compliance with the order of January 15, 1898. On April 2, 1898, an order was entered overruling the motion for a new trial, and purporting to enter judgment upon the verdict of December 20, 1897. On April 11, 1898, an order was entered overruling a motion entered upon April 6, to set aside judgment of April 2. The appeal is from the judgment of April 2, 1898, and the bond recites that it is also from the order of April 11, 1898.

SAMUELS & SELIGMAN, attorneys for appellant.

ROBT. W. CAMPION, attorney for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

The judgment entered by the County Court on December 20, 1897, is final, and has not been affected by any of the orders entered subsequent to that time. This judgment was of the December term, and the order of January 15, 1898, which purported to vacate it, was of the January term. No motion to vacate was entered of the December term.

There is no showing of any matter which would be ground of error *coram nobis*. Consequently the order of January 15, 1898, was inoperative, and the various orders entered subsequent thereto are of no effect. There being two judgments of record in the cause, one of which is valid,

viz., the judgment of December, 1897, and the other of which is invalid and a nullity, viz., the judgment of April 2, 1898, it follows that the court should, upon motion of appellant, have eliminated the latter and void judgment from the record, and it should also eliminate from the record all of the void orders entered subsequent to the final judgment of December 20, 1897. *Keeler v. The People*, 160 Ill. 179.

The judgment entered as of April 2, 1898, is reversed and the cause remanded, with directions to eliminate from the record all of the orders above considered which are subsequent to the judgment of December 20, 1897. Reversed and remanded with directions.

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West Chicago St. R. R. Co. v. Andrew G. Lundahl, for use of Charles Hamill.

1. **ASSIGNMENT—Of a Cause of Action—Effect of—When Void.**—Where the assignment of a cause of action is void it is a nullity, and the legal title and equitable ownership of the cause of action both remain in the assignor.

2. **PARTIES—The Words “For the Use of”—When Surplusage.**—Where the assignment of a cause of action is void, but the action is brought in the name of the assignor for the use of the assignee, the use of the words “for the use of,” etc., is a matter of no moment and may be treated as surplusage.

3. **JURORS—What is Not Misconduct of.**—Under the direction of the court a bailiff took a juror to a telephone in an adjoining room, where he telephoned some instructions to one of his employes at his place of business, and the bailiff returned with him to the jury room. He talked to no other person while absent from the jury room. The bailiff was with him during all the time he was absent. Within a short time after his return, the jury came into court and announced their verdict. *Held*, no error, it not appearing that the party was in any manner prejudiced by the temporary absence of the juror from his fellow-jurors.

Action in Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed May 8, 1899.

ALEXANDER SULLIVAN, attorney for appellant; EDWARD J. McARDLE, of counsel.

FRANCIS T. MURPHEY, attorney for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment in an action in case by appellee against appellant. The declaration commences "Andrew G. Lundahl, for the use of Charles Hamill," etc. After averring the ownership and operation by appellant of an electric street railway in Ashland avenue, in the city of Chicago, and the duty of the appellant to so manage and operate the same as to avoid injury to persons rightfully using the street, the declaration proceeds as follows:

"Yet the defendant, disregarding its duty in this behalf, and while the plaintiff, exercising due care for his own safety, was driving, to wit, a certain horse and wagon, and was then and there crossing said railway tracks, to wit, where the said Ashland avenue intersects and crosses, to wit, Ohio street in said city, the said defendant then and there so carelessly, negligently and improperly moved, drove and managed the said car that by and through its negligence in this behalf its said car ran upon and against the said horse and wagon, by reason whereof, and as the result of said negligence, the plaintiff was then and there thrown to and upon the ground with great force and violence and greatly bruised, wounded and mangled," etc.

Ashland avenue is a north and south street, and Ohio and Indiana streets are east and west streets and intersect Ashland avenue, Ohio street being the next street north of Indiana street and about 500 feet from it. Appellant had two car tracks in Ashland avenue. Its cars ran north on the east and south on the west track. August 20, 1897, about six o'clock p. m., appellant was running a car north on the east track. Appellee was driving a wagon loaded with soda water, weiss beer, porter, cider and other like liquids, and empty bottles. The wagon and load weighed from 4,000 to 5,000 pounds, was drawn by two horses, and the distance from the end of the pole to the rear part of the hind wheels was about twenty-four feet.

Appellee was driving east on Ohio street, and when he drove onto Ashland avenue, he looked south and saw appellant's car just starting north on the east track from Indiana street. Not apprehending any danger, he continued to drive across Ashland avenue. The intersection of Ashland avenue and Ohio street, where he was driving, was in bad condition, appellant's tracks being from five to six inches above the surface of the street, so that appellee was compelled to drive very slowly. When the horses and fore part of the wagon had crossed the east track, the hind wheels of the wagon being on the track, appellant's car, moving north on that track, collided with the wagon, moving it about two feet, breaking down the left hind wheel and tipping the wagon to the left side. The horses, at the same time, became frightened by the collision, and sprang forward, and appellee was thrown from his seat and fell between the horses. The evidence is conflicting as to whether he fell on the tongue or pole of the wagon, or on the ground, or partly on the pole and partly on the ground. When picked up he was on the ground.

The trial occurred February 1, 1896. Appellee testified as follows:

"I got home; I sent for a doctor—Dr. Doe; he has been treating me yet; I got a big lump on my head there, and across my stomach I was all blue, all around there; I feel pain there and in my knees and feet; my knees and feet was all bruised too; the head is all right now; I feel pain in the stomach all the time; my knee is all right; my foot, I can't use that at all; it gets worse instead of better; I have to walk around now with crutches; I have been compelled to use crutches ever since I was injured; before, my limbs were all right; they were good and strong; my health is no good at all now; before I got injured my health was good; there is a difference in my weight of about forty pounds; my appetite now isn't good; I have been suffering all the time since that time; I have not been doing a day's work since."

Dr. Doe, who attended appellee immediately after he was injured, testified as follows:

"I was called to attend Lundahl on the 20th of August, 1897; when I came down there, he was lying in bed, and he

had pain all over his body; on the right side of his head he had a bump about as large as an apricot, and he was bruised and bleeding on the same side; on the left hand, inside on the arm, he was bleeding, and on the stomach, on different places; on the stomach he had big black spots, extravasats from the blood, of course, and down here on the right hip it was hurt, and it was bruised and blue, and the knees were swollen, and the ankles were swollen and blue. He complained about pain in his head and in his stomach; he continued to complain about pain in his head and in his stomach for about eight days. There was a good deal of difficulty in urinating. I have attended him since that time, and am still attending him; the first week I was there every day, then I was there three times a week, two times a week, and now I have not been there so often, of course. The present condition of the plaintiff is that he seems to be all right in his head and in the upper part of his body, but the right ankle is swollen, and he is unable to walk. Such an appearance of an injury as I have described is painful; pains right along, more or less, of course. It is the right leg. I think he will be permanently injured. It will be difficult for him to walk, of course, and it depends upon how much pain he will have by walking."

The jury found appellant guilty, and assessed appellee's damages at \$3,000, for which judgment was rendered.

The appellee was earning \$22 per week at the time. Counsel for appellant contend that the action is not maintainable, for the reason that it purports to have been brought for the use of Charles Hamill. There is no evidence that the cause of action has been assigned to Hamill, but counsel infer that it has been so assigned, from the fact that the suit purports to be for Hamill's use—insist the assignment is void—citing *Railroad Co. v. Ackley*, 171 Ill. 100—and jump to the conclusion that, therefore, the suit can not be maintained. If it be conceded that there has been a formal assignment of the cause of action to Hamill, the conclusion of counsel that the suit can not be maintained does not by any means follow from the premise that the assignment is void, because if void it is a nullity; the legal title and equitable ownership both remain in appellee, and the words, "for the use of Charles Hamill," are mere sur-

plusage. The use of these words is a matter of no moment to appellee; it can not be prejudiced by, or have any advantage because of them. *Boone v. Stone*, 3 Gilm. 537; *Schiff v. Supreme Lodge, etc.*, 64 Ill App. 341.

Counsel for appellant further contend that appellee was guilty of negligence which contributed to the accident; that the verdict is contrary to the evidence, and that the damages are excessive. The jury have found by their verdict that appellee was injured, while in the exercise of ordinary care, by the negligence of appellant. Having carefully read and considered the evidence, we can not say that the verdict is manifestly against the weight of the evidence, nor can we hold that the damages are excessive. It appears from affidavits filed in support of a motion for a new trial, that the jurors retired to the jury room about 11:30 o'clock A. M., to consider of their verdict; that about 2:15 o'clock P. M., the bailiff in charge of the jury informed the court that one of the jurors desired to telephone to his place of business, whereupon the court told the bailiff that the juror might do so, and that he might take the juror to the telephone, provided he would remain with him while at the telephone and going from and returning to the jury room. The telephone was in the court house, in a room adjoining another court room. The bailiff took the juror to the telephone and he telephoned some instructions to one of his employes at his place of business, when the bailiff returned with him to the jury room. He talked to no other person while absent from the jury room. The bailiff was with the juror during all the time he was absent from the jury room. Within a short time after the juror returned to the jury room the jury came into court and announced their verdict.

The permitting the juror to absent himself from the jury room, as above stated, is assigned as error. There is no evidence that appellant was in any manner prejudiced by the temporary absence of the juror from his fellow-jurors. In *Sanitary District v. Cullerton*, 147 Ill. 385, the court say: "In civil cases the court will always inquire whether

injury has ensued from the separation, and when no abuse is shown or suggested, it will not be sufficient to avoid the verdict. *Graham & Waterman on New Trials*, 80-85; *Drummond v. Leslie*, 5 Blf. (Ind.) 454."

The judgment will be affirmed.

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113	565
82	558
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Warren Springer v. Willard T. Orr.

1. COMMON COUNTS—*When Sufficient*.—Where a person has performed his contract, and nothing remains but the payment of the agreed price, it is sufficient to declare on the common counts.

2. POWERS OF ATTORNEY—*When Prima Facie Proof of Authority*.—The fact that a power of attorney purports to be executed by a person, acknowledged before a notary public, and ample in its terms to authorize the person appointed to perform the acts mentioned, is *prima facie* proof of such authority.

3. BURDEN OF PROOF—*Where Names are Identical*.—If the maker of a power of attorney is not the same person who acts under it, the names being identical, it is incumbent on the party objecting to show that fact.

4. ACKNOWLEDGMENT—*Purpose of — Date Not Important*.—An acknowledgment is of value only as showing that the instrument was in fact executed by the person whose name is signed to it. The date it was signed is not important in establishing the validity or binding character of the instrument.

5. BROKERS—*When Not Necessary to Show a Purchaser Ready, Able and Willing*.—It is only when a conveyance is not made, or no contract entered into, that the broker must show a purchaser was ready, able and willing on the terms proposed, before he can recover his commissions.

6. INSTRUCTIONS—*Notation of Authority in*.—An instruction which has the notation of an authority, an Illinois case at the end, is improper, but not reversible error.

7. SAME—*When Estopped to Question*.—A party who asks for an instruction is estopped from questioning an instruction given for his adversary based upon a similar theory of the case.

Assumpsit, for commissions. Trial in the Superior Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Verdict and judgment for plaintiff: appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed May 8, 1899.

Statement of the Case.—Appellee brought suit against appellant to recover for commissions on a contract negotiated by him between appellant and one Malcolm for the exchange of certain real estate between the parties to the contract, which was dated May 15, 1896.

The declaration is the common counts for goods, wares and merchandise sold and delivered, money lent and advanced, money paid, money received, money due for interest, for the price and value of work done and material for the same provided; and for amount due on an account stated between them.

A trial before the court and a jury resulted in a verdict and judgment of \$500 for appellee, from which this appeal is taken.

The evidence shows that appellee, who was then in the real estate business, under the name of W. T. Orr & Co., and licensed as a real estate broker by the city of Chicago, was employed in April, 1896, by appellant, to find him a purchaser or customer for a certain leasehold in Chicago, owned by him, and that appellant, as the preponderance of the evidence shows, agreed to pay appellee for such service, as a commission, the sum of \$500. Appellant says he agreed to pay \$500 commission "if the trade went through," but has no corroboration. Appellee procured such a person, one Sherman E. Malcolm, who, by A. J. Vesey, his attorney in fact, entered into a contract in writing with appellant, dated May 15, 1896, by which appellant agreed to sell and convey said leasehold to Malcolm in consideration that Malcolm convey to appellant certain real estate in Park Ridge, Cook county, Illinois, describing it, and setting out specifically the details of the exchange, and also providing that appellant should pay appellee \$500, and Malcolm should pay Vesey \$500 as brokerage fees. When the time came for furnishing abstracts of title, as provided by the contract, appellant, as a clear preponderance of the evidence shows, refused to furnish his abstract or carry out the contract, as he claims, because Malcolm was not responsible, and because he refused to pay the ground rent from March 1, 1896, on

appellant's leasehold. The contract of exchange provided for a conveyance by appellant of the leasehold to Malcolm clear of all incumbrances, "except the ground rent since March 31, 1896," but it has no provision requiring Malcolm to pay any ground rent at any time. Appellant testified also that he was ready and willing to carry out the contract if Malcolm would "come forward and pay the quarter ground rent that was due on the first of March." He also testified that he "never refused to carry out the deal."

The court gave proper instructions to the jury, both upon appellant's and appellee's theory of the case, but gave two instructions for appellee, and refused one requested by appellant, which will be referred to in the opinion.

W. N. GEMMILL, attorney for appellant.

"Common counts are appropriate only when the defendant has received in some form the equivalent of the money which he is called upon to pay. When his obligation to pay rests only upon his non-performance of his promise, however good the consideration for the promise, the declaration must be special." *Neagle v. Herbert*, 64 Ill. App. 619; *Zjednoczenie v. Sadecki*, 41 Ill. App. 329.

PINNEY & ORR, attorneys for appellee.

The presumption is that Sherman E. Malcolm, who executed this power of attorney, was the same Sherman E. Malcolm who signed the contract, and in whose name the title to the real estate was. *Brown v. Metz*, 33 Ill. 339; *Thompson v. Manlow*, 1 Cal. 428.

The burden of proving that he was not the same person is on the defendant. *Jackson v. King*, 5 Cow. (N. Y.) 239; *Jackson v. Colby*, 9 Cow. (N. Y.) 149.

Where nothing remains but to pay over the money the common counts are always good. *Gottschalk v. Smith*, 156 Ill. 380.

If the plaintiff has performed and the defendant received under the contract, then the action may be maintained under the common counts, even though the sale was not consummated. *Kerfoot v. Steele*, 113 Ill. 616; *Swigart v. Hawley*, 140 Ill. 136.

Where the services are fully completed, there is no need to declare specially, and recovery may be had on a general *indebitatus assumpsit*. First Nat'l Bank v. Hart, 55 Ill. 62; Comb vs. Steele, 80 Ill. 101.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

Appellant contends, first, there could be no recovery under the evidence on the common counts; second, that the court admitted improper and incompetent evidence; third, that there could be no recovery because one Weber, who brought about the execution of the contract between appellant and Malcolm was not at the time a licensed broker; fourth, that there could be no recovery because the exchange was not completed; and fifth, that the court erred in its rulings on instructions.

As to the first contention, it is sufficient to say that appellee had performed his contract, and nothing remained but the payment of the agreed price by appellant. In such case, it is sufficient to declare on the common counts. The count for work done is all that is necessary, under the evidence. 2 Greenleaf on Evid., Sec. 104, and cases cited; Swigart v. Hawley, 140 Ill. 186; Gottschalk v. Smith, 156 Ill. 380; Combs v. Steele, 80 Ill. 101; Berkowsky v. Specter, 79 Ill. App. 215, and cases cited.

It is unnecessary to review the numerous cases from other States cited by appellant's counsel. The adjudications of this State control.

Second. It is objected that the court improperly admitted in evidence the contract between appellant and Malcolm, because no authority of Vesey to sign Malcolm's name to the contract was shown, and it was not shown that the Sherman E. Malcolm whose name was signed to the contract is the same Malcolm who signed a certain power of attorney which was offered to show Vesey's authority to act for Malcolm, the owner of the Park Ridge property agreed to be conveyed to appellant. The power of attorney is dated March 10, 1896, purported to be exe-

cuted by Sherman E. Malcolm, and was acknowledged before a notary public, and is ample in its terms to authorize Vesey to make and sign the contract in question. This was *prima facie* proof that Vesey had authority to make the contract. *Brown v. Metz*, 33 Ill. 339.

If the maker of the power of attorney was not the same person whose name was signed to the contract of exchange, the names being identical, it was incumbent on appellant to show that fact. *Jackson v. Colby*, 9 Cow. (N. Y.) 149.

But it is further objected that the power of attorney though dated March 10, 1896, was not acknowledged until April 1, 1898, long after the contract of exchange was made. The objection is not tenable. It will be presumed, there being no evidence to the contrary, that the power of attorney was made the day it bears date. It has never been held objectionable for an instrument relating to the conveyance of real estate to be acknowledged at a date subsequent to the date of the instrument. The acknowledgment is of value only as showing that the instrument was in fact executed by the person whose name is signed to it, and the date it was signed is not important in establishing the validity or binding character of the instrument.

Complaint is also made that the court excluded a letter written by appellant to W. T. Orr & Co., dated June 18, 1896, which, it is claimed, was in answer to a previous letter by Orr to appellant concerning the completion of the trade. The letter was not competent, in the absence of Orr's letter or some proof of its contents, which was not made. Nor was it proper because it contained only self-serving declarations. A litigant will not thus be allowed to make evidence in his own behalf. The witness testified that Malcolm owned the property at Park Ridge, and appellant moved to strike out the evidence, which motion the court overruled. It is improper, and also an immaterial fact. The evidence should have been stricken out, but we are unable to see how it prejudiced appellant.

Numerous other objections as to the court's rulings on the admission and exclusion of evidence are made, all of

which we have considered, but think that none of them present any reversible error. They are not of sufficient importance to require special mention.

Third. Weber was in the employ of appellee and paid by him for his services. It is shown that appellee was at the time of the transaction in question a regularly licensed real estate broker by the city of Chicago, which made the fact that Weber was not licensed a matter of no consequence.

Fourth. Appellee earned his commissions when he procured Malcolm, through Vesey, to take appellant's leasehold in exchange for the Park Ridge property, he being acceptable to appellant and having signed a contract to that effect with appellant. It was unnecessary, under such circumstances, for appellee to show that Malcolm was ready, able and willing to carry out the exchange according to the contract. *Pratt v. Hotchkiss*, 10 Ill. App. 603; *Goodridge v. Holladay*, 16 Ill. App. 365, and cases cited.

-It is only when a conveyance is not made, or no contract is entered into, that the broker must show the purchaser was ready, able and willing to purchase on the terms proposed, before he can recover his commissions. *Schmidt v. Keeler*, 63 Ill. App. 488, and cases cited *supra*.

Fifth. The first instruction given for appellee is not based upon the evidence, in that it proceeds upon the theory of a sale effected through the instrumentality of the agent. The evidence does not justify such an instruction, but we are unable to perceive in what way the instruction could have prejudiced appellant. The instruction also has the notation of an authority, an Illinois case, at the end. This also was improper. We are unable, from a careful examination of the evidence, to see how the jury could have found any other verdict than it did, and the instruction, while improper, is not sufficient cause for a reversal.

The third instruction for appellee also proceeds on the theory of a sale, but the same is true of this as of the first instruction. The error does not call for a reversal.

Moreover, appellant's third instruction asked, but refused by the court, is also based upon the theory of a sale, and estops appellant from claiming appellee's instructions, based

on a like theory, are cause for reversal. *Watson Cut Stone Co. v. Small*, 80 Ill. App. 328, and cases there cited.

Appellant's third instruction was properly refused, because it, in substance, told the jury appellee could not recover unless he provided a purchaser ready, able and willing to buy or exchange. This, as we have seen under the authorities cited *supra*, is not the law applicable to the facts of this case. The judgment is affirmed.

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James Larney et al. v. The People, etc., for the Use of Charles A. Pusheck.

1. *REPLEVIN—Liability of the Officer in Taking Bond.*—In taking a replevin bond the officer is not an insurer of the sufficiency of the surety and is only liable if he fails in the exercise of diligence and care and use of information reasonably at command, and such exercise of sound judgment as a prudent man would use in important business affairs.

Debt, on a replevin bond. Trial in the County Court of Cook County: the Hon. R. W. S. WHEATLY, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed May 8, 1899.

McCLURE & ANDERSON, attorneys for appellant.

It is sufficient if a sheriff or constable, in accepting a surety on a replevin bond, resorts to the usual means to acquire a knowledge of his responsibility and takes security believed and understood by well informed men to be responsible. *People v. Robinson*, 89 Ill. 159; *Robinson v. People*, 8 Ill. App. 279.

The requirement of the law is answered if the officer accepting a surety on a replevin bond has availed himself of the best means of forming a correct opinion of the value of the property owned by the surety, and believes that it is of the required value. *People v. Haines*, 5 Gilm. 528.

Payment of a judgment can be shown by parol testimony. *Black on Judgments*, Vol. 2, Sec. 990; *Hollenbeck v. Stansberry*, 38 Ia. 325.

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It is competent to show in mitigation of damages in a suit on a replevin bond that the replevin suit was not tried upon its merits, and that the right of property was, in fact, in the plaintiff in the replevin suit. *Rankin v. Kinsey*, 7 Ill. App. 215; *Chim v. McCoy*, 19 Ill. 604; *Holler v. Coleson*, 23 Ill. App. 324; *Stevison v. Earnest*, 80 Ill. 513.

Where it can be shown that the replevin suit was not tried upon its merits, and complaint is made that the surety on the replevin bond was insufficient when taken, before suit can be commenced against the officer who accepted the surety, the proper damages must have been ascertained by a suit against the principal and surety on the replevin bond. *Carter v. Duggan*, 10 N. E. Rep. 486.

J. N. SWARTS, attorney for appellee.

A person has no right to substitute his belief of what is right in opposition to the law, however good his intentions may be. The law has made him virtually the agent of both parties, and it has prescribed his duties whilst so acting, and he has no right to substitute his opinion, however honest, for the requirements of the law. It has spoken, and he must obey. *People for use, etc., v. Core et al.*, 85 Ill. 243.

A sheriff who does not take a proper bond in replevin is liable on his official bond. In taking a bond, the officer acts as the agent of the law and not of a party to the suit; he must know the law and keep within it at his peril. An officer is liable on his official bond if he takes insufficient surety on a replevin bond, and the measure of damages is not the value of the property replevied, but is the amount plaintiff has lost by reason of the misdoing of the defendant in accepting insufficient securities. *Cobbey on Replevin* (1890), Sec. 686.

He can require just such a bond as the statute provides for and none other; but he is the sole judge of the bond, and is responsible on his official bond if he fail in his duty to either party. If he once passes upon the bond, so far as he is concerned, his act is final.

He is not an insurer of the continued solvency of the parties to the bond, but is responsible for their solvency at the time they sign the bond. He is also responsible for the bond being executed in a statutory manner. Cobbey on Replevin, Sec. 679.

The sheriff in a replevin suit is not authorized or directed by the statute to deliver the property to the plaintiff he seizes upon the writ, until the plaintiff furnishes him a bond with sureties of undoubted sufficiency. The People, for use of Fletcher, v. Lee, 65 Mich. 557.

MR. JUSTICE SEARS delivered the opinion of the court.

This suit was originally commenced before a justice of the peace, against appellants, James Larney, a constable, and his sureties on his official bond, for the failure of said Larney to take sufficient security on a replevin bond before executing a writ of replevin. The case was appealed to the County Court, where a trial was had by the court with a jury. The plaintiff, appellee, recovered judgment. From that judgment appellants prosecute this appeal.

Only two of the grounds of error relied upon by appellants need be considered. First, that the court erred in the giving of the first, second and third instructions tendered by appellee; and, secondly, that no damages could be properly assessed in this suit upon the official bond for value of goods taken on the replevin writ, because, it is claimed, the replevin suit was not tried upon its merits and there has been no suit upon the replevin bond.

The objection urged to the instructions in question is, that they make the constable an insurer of the sufficiency of the surety on the bond, irrespective of the degree of care which he may have exercised in examining as to the surety.

The first of the instructions in question is as follows:

"The jury are instructed that it was the duty of the defendant, James Larney, before executing the writ of replevin, to take a replevin bond with sufficient security in double the value of the property about to be replevied, and unless the defendant, James Larney, did take such security, the jury should find for the plaintiff."

The second and third instructions are subject to the same objection. It is argued by counsel for appellants that the element of care and diligence on the part of the officer is ignored in these instructions, and that the jury are in effect informed that if the officer failed to secure a bond with sufficient security, then they were to find for the plaintiff, without regard to evidence tending to show that the officer had exercised such care and diligence and sound judgment as the law required of him. In other words, the complaint is that the instructions make the officer an insurer of the sufficiency of the surety, and hence are erroneous.

By Section 12 of Chapter 119, Rev. Stat., it is provided that if the officer shall return an insufficient bond he shall be held liable, etc.

The authorities are not altogether in harmony as to the liability imposed upon the officer in this behalf. There are authorities which hold in effect, in construing statutes like the one here in question, that the officer is answerable for the solvency and sufficiency of the surety on the bond accepted by him, and can not excuse himself from liability by any showing of diligence, if the surety accepted prove to have been in fact insufficient. Wells on Replevin, Sec. 385; Cobbey on Replevin, Sec. 679; Gibbs v. Bull, 18 Johns. 437; Oxley v. Cowperthwaite, 1 Dall. (Pa.) 349; Pearce v. Humphreys, 14 Serg. & R. 25.

And it has been held that the officer is not only answerable for the solvency and sufficiency of the surety when the bond was accepted, but as well for the solvency and sufficiency of the same at the time when the surety is called upon to respond to his obligations. Meyers v. Clark, 3 Watts & S. 535.

The thirteenth section of chapter 119 of our statute provides against the latter construction by enacting, in effect that if the surety is sufficient when accepted, subsequent insolvency or insufficiency shall not operate to render the officer liable.

But there are decisions which apply a construction to like statutes much less severe in the liability imposed upon the officer.

In *Mounson v. Redshaw*, 1 Saund. 195, note m., it is said : "If at the time of the taking of the bond the sureties were apparently responsible, the sheriff is not liable to an action for taking insufficient pledges." See also *Hindle v. Blades*, 5 Taunton, 225; *Scott v. Waithman*, 3 Stark. N. P. C. 168; *Jeffery v. Bastard*, 4 Ad. & El. 823.

In this State it would seem that the officer is held not to be an insurer of the solvency and sufficiency of the surety at the time of accepting the bond. In *People v. Core*, 85 Ill. 248, the court, while not having under consideration the solvency of a surety, yet discusses the liability of the officer in general, and intimates that it is to be determined by the degree of care and diligence exercised by him in examining into the sufficiency of the bond.

In two later decisions, viz., *People v. Robinson*, 89 Ill. 159, and *Robinson v. People*, 8 Ill. App. 279, both the Supreme Court and this court indicate that the officer may be excused from liability by a sufficient showing of diligence, the using of the best means of information reasonably at his command, and the then apparent sufficiency of the surety when thus examined and accepted.

In the case cited the Supreme Court said :

"It appears the sheriff resorted to the usual means to acquire a knowledge of his responsibility. He not only inquired of the neighbors, and of reliable men who knew the surety, and of the assessor, but he administered an oath to the surety, the effect of all which was to satisfy the sheriff the surety was good. It is sufficient if he takes security believed to be, and understood by well informed men to be, responsible. We can not think the sheriff was derelict in his duty in this particular. The evidence shows at the time Charles W. Jagerman signed the bond, he was good and sufficient. The sheriff can not be held to be an insurer."

And in the same suit this court said :

"The real point of the instruction was, excluding this matter of surplusage, that the plaintiff's right of recovery was made dependent solely upon the question whether the bond was in fact good and sufficient. If this be so, then the sheriff is an insurer; but the law does not make him

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such, and only requires of him that he should be guilty of no omission of duty, and avail himself of the best means of information reasonably at his command, and exercise such sound judgment as a prudent man would use in important business affairs."

It is true that in the Robinson case the Supreme Court declares that the surety was in fact "good and sufficient;" yet we can not interpret the decision as announcing any different rule than that announced by this court in the same case through the opinion of Mr. Justice Baker, viz., that the officer is not an insurer of the sufficiency of the surety, and is only liable if he fail in the exercise of diligence and care and use of information reasonably at command, and such exercise of sound judgment as a prudent man would use in important business affairs.

Governed by these decisions, we must hold that the instructions in question are erroneous.

We are relieved from any consideration of the questions of law raised by the second contention of appellants, by reason of the fact that there was a trial of the merits of the replevin suit, viz., the trial before the justice of the peace.

We find it unnecessary to consider other questions raised by the briefs because of the view we take of the instructions given.

For error in the giving of the instructions considered the judgment is reversed and the cause is remanded.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

SECOND DISTRICT—DECEMBER TERM, 1898.

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The People, etc., ex rel., etc., v. H. H. Blair.

1. **DEMURRER**—*Does Not Admit the Pleader's Conclusions.*—A demurrer does not admit the pleader's conclusions, nor the construction placed by him upon statutes, nor the correctness of his inferences from the facts stated.

2. **CITY MARSHAL**—*Office Abolished by the Adoption of the General Law.*—The adoption by a city of the general law for the incorporation of cities, operates *eo instanto* to abolish the office of city marshal.

3. **SAME**—*Under the General Law.*—Under the general law there can be no office of city marshal unless the city council, after organization thereunder, creates it by ordinance directing whether such officer shall be appointed or elected.

4. **CITIES AND VILLAGES**—*Effect of Reorganization upon the City Marshal.*—Where a municipality under a special charter reorganizes under the general law, the continuance of the office of city marshal, and the officer holding it, is repugnant to it, as it might defeat the intent of the general law.

5. **SAME**—*What is Necessary to Carry the General Law into Effect.*—In order that the law may be carried into effect it is necessary that the adoption of the general law shall operate to abolish the old office of city marshal, and to terminate instantly the functions of the prior incumbent, so that the city council of the new city be left in a position to legislate with entire freedom upon the subject.

6. **OFFICERS**—*Terms of, Where Not Fixed By Ordinance*—**City Marshal.**—The city marshal of a city incorporated under the general act, where no term is fixed by the ordinance creating the office, is entitled to hold for two years unless the council during such period by ordinance prescribes a shorter term.

The People v. Blair.

7. **CITIES—*Mayors pro tem.***—There can not be two acting mayors of a city at the same time. During the time a mayor *pro tem.* is presiding, if he is lawfully appointed, every act done elsewhere by the regular mayor, as such, must necessarily be void.

8. **SAME—*When a Mayor pro tem. May Be Appointed and When a Chairman.***—When the mayor is present in the city, acting as mayor or able to perform the duties of the office generally, but is absent from a council meeting, either because he merely chooses to be absent, or because he is engaged in official business in another part of the city, or is ill, the power of the council is confined to electing a temporary chairman, who will possess the authority of presiding officer only and not of mayor.

9. **SAME—*Powers of the Council in Mayor's Absence.***—The fact that the mayor had been derelict in his duty to nominate a city marshal, and that the preservation of public order demanded the appointment of such an officer, does not justify the council in taking the reins of power from the mayor and appointing a mayor *pro tem.* who will make the nomination.

10. **MUNICIPAL OFFICERS—*Terms of Office.***—Municipal officers appointed or elected for a fixed term hold over till the election or appointment and qualification of their successors, unless a contrary legislative intent is manifest, and no such contrary legislative intent appears in the general act for the incorporation of cities.

11. **SAME—*When the Mayor Delays an Appointment.***—If the mayor delays an appointment, either an unreasonable time, or longer than suits the pleasure of the council, that body thereby acquires no right to deprive him of his functions and appoint one of its own number to take the desired action. The courts furnish the remedy to compel an officer to perform his duty.

Information Quo Warranto.—Trial in the Circuit Court of McHenry County; the Hon. CHARLES H. DONNELLY, Judge, presiding. Judgment for relator on demurrer to plea; appeal by respondent. Heard in this court at the December term, 1898. Reversed and remanded with directions. Opinion filed April 11, 1899.

V. S. LUMLEY, State's Attorney, R. K. WELSH, CHAS. H. FISHER and J. M. MARKS, attorneys for appellant.

The office of city marshal was created, the duties of that officer prescribed, and the term of office fixed at two years, unless sooner removed by the appointing power, by the ordinance of the city of Marengo, passed May 7, 1895, and the statutory provisions in relation to that office. Ordinance of May 7, 1895, Abst. p. 9, Chap. 24 of Revised Statutes.

The office of city marshal, marshal, or superintendent of police of the town of Marengo, was abolished and the ordinance of December 10, 1892, therefore repealed by the incorporation of the city of Marengo under the general law. *People v. Brown*, 83 Ill. 95; *Crook v. People*, 106 Ill. 237; *McGrath v. Chicago*, 24 Ill. App. 19.

When the object and reason for which a statute ordinance or law was passed is removed by a later enactment, the later law acts as a repeal of the former. *Geisen v. Heiderich*, 104 Ill. 537; *Enos v. Buckley*, 94 Ill. 458; *Ency. of Law*, Vol. 23, p. 489.

By the provisions of Section 11, Art. 1, Ch. 24, R. S., all ordinances, resolutions and by-laws in force in any city or town when it organizes under the general law continue in full force and effect until repealed or amended; it is not intended that any such existing by-law, resolution or ordinance which is in conflict with the provisions of the new charter should be regarded as kept in force; only such as are enforceable are preserved. *Baader v. Town of Cullman (Ala.)*, 22 So. Rep. 19; *People v. Brown*, 83 Ill. 95.

The ordinance of the city of Marengo passed May 7, 1895, repealed the ordinance of the town of Marengo passed December 10, 1892, even if there had been no incorporation under the general law at all. The ordinance of 1895 follows closely the language of the statute, legislates upon the entire subject except such part as is covered by and included in the statutory law itself, and is clearly intended to be the only legislation upon the subject. *Dingman v. The People*, 51 Ill. 277; *Booth v. Carthage*, 67 Ill. 102; *Andrews v. People*, 75 Ill. 605; *Devine v. Commissioners*, 84 Ill. 590; *Chicago v. James*, 114 Ill. 479; *People v. Nelson*, 156 Ill. 364; *People v. Loeffler*, 175 Ill. 585, 51 N. E. Rep. 785; *People v. Davis*, 114 Cal. 363; *Keese v. Denver*, 10 Col. 112; *Swindell v. State*, 143; *Ind.* 153; *Vonderleith v. State*, 37 Atl. Rep. (N. J.), 436; *Schmalzreid v. White (Tenn.)*, 36 S. W. Rep. 393; *Kent v. U. S.*, 73 Fed. Rep. 680; Vol. 23 *Ency. of Law*, p. 485, and authorities there cited; *Heckman v. Pinkney*, 81 N. Y. 211.

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The foregoing rule is true, even though material parts of the former act are omitted in the later. *Schmalzreid v. White*, 36 S. W. Rep. 393; *Terrell v. State*, 86 Tenn. 523.

The term of office of the city marshal of Marengo being fixed only by the general statute was limited to two years, and when Dunwoody was appointed in May, 1897, his appointment under the law then in force was for a period of two years, unless sooner removed by the mayor. The appointment is for the full term of the office even though a shorter term be designated by the appointing power, and the fact that the mayor named him again in May, 1898, makes no difference. *Sec. 3, Art. 6, Chapter 24; City of Jacksonville v. Allen*, 25 Ill. App. 54; *Forristal v. People*, 3 Ill. App. 470; *Robb v. Carter*, 65 Md. 321; *People v. Robb*, 126 N. Y. 180; *Patten v. Vaughn*, 39 Ark. 211; *People v. Hill*, 7 Cal. 97; *Williams v. Broughner*, 46 Tenn. 486; *Hale v. Biscoff (Kas.)*, 36 Pac. Rep. 752; *Throop on Public Officers*, Secs. 304, 354, and authorities there cited.

The fact that Dunwoody's bond may not have been approved as required by the statute does not vacate the office. The city council recognized him as an officer for a whole year after the giving of the bond. He did all that he could do. He executed the bond, delivered it to the clerk, who is the clerk of the council, and to the mayor, who is a member of the council. Under such circumstances nothing short of an actual disapproval of the bond could vacate the office. The silence of the council and its records on the subject for such length of time amounts to an approval. The statutory provision in this respect at most is only directory. *Davis v. Haydon*, 3 Scam. 35; *Green v. Wardwell*, 17 Ill. 278; *Bartlett v. Board of Education*, 59 Ill. 364; *Boone Co. v. Jones*, 54 Ia. 699; *State v. Barnes*, 51 Kas. 688; *Aphorp v. North*, 14 Mass. 167; *State v. Dahl*, 65 Wis. 510; *State v. Knight*, 82 Wis. 151; *Throop on Public Officers*, Secs. 184 and 185.

Where there is a limit placed to the term of office there must be an express removal by the appointing power before a successor can be appointed within that term. The appoint-

ment of a successor is not *ipso facto* a removal. Until such removal there is no vacancy. Clark v. People, 15 Ill. 213; State ex rel. Reimer v. Curry, 134 Ind. 133.

The statutes prescribe the method by which any officer may be removed. A well worn rule of law says that the statutory expression of one method excludes all others. Sec. 7, Art. 2 of Chap. 24, R. S.; Gaddis v. Richland Co., 92 Ill. 119; Loverin v. McLaughlin, 161 Ill. 425.

The demurrer to respondent's plea admits nothing except facts well pleaded therein. It does not admit inferences from them nor conclusions of the pleader. Greig v. Russel, 115 Ill. 488; Johnson v. Roberts, 102 Ill. 658; Arenz v. Weir, 89 Ill. 25; Harris v. Cornell, 80 Ill. 62; Ebersole v. First Nat'l Bank, 36 Ill. App. 267; People v. Cooper, 139 Ill. 461.

In a quo warranto proceeding where the respondent justifies by his plea, claiming title to the office, he must, by apt averments, clearly show a valid title to the office. A plea of justification showing title to the office, defective in any particular, is not sufficient. Clark v. People, 15 Ill. 213; People v. Ridgley, 21 Ill. 65; Gunterman v. People, 138 Ill. 518.

The mayor of cities incorporated under our general law acts in a dual capacity. First, as the chief executive officer of the city, with all the functions pertaining to that office; and, second, as a member and presiding officer of the city council. Secs. 1-6, Article 2, Chapter 24, R. S.; City of Carrollton v. Clark, 21 Ill. App. 74.

The power of appointment when vested in the mayor by legislative enactment is an executive function, or a function to be exercised as chief executive officer of the city, and not as a member of the council. In re Achley, 4 Abb. Pr. 35; State v. Barbour, 53 Conn. 76; Taylor v. Com, 3 J. J. Marsh, 401; State v. Noble, 118 Ind. 361; State v. Hyde, 121 Ind. 20; People v. Sanderson, 30 Cal. 160; In re Supervisors, 114 Mass. 247; Atty. General v. Varnum, 167 Mass. 477; People v. Morgan, 90 Ill. 562.

A mayor *pro tem.* can exercise the functions of the office

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of a mayor only when the mayor is temporarily absent, not from a meeting of the council, but from the city, or under disability which prevents him from exercising his duties as mayor in both of his capacities as executive officer and member of the council. When the mayor is only temporarily absent from a meeting of the city council, and still in the city and exercising the functions of his office as chief executive, the power of the council with reference to a presiding officer is circumscribed by the right to elect a temporary chairman.

See and compare Sections 2, 3, 4 and 5, Art. 2, entitled "Of the Mayor," and Section 10 of Art. 3, entitled "Of the City Council," of Chap. 24 of the Revised Statutes.

A statute must be so construed that effect will be given to every word and sentence contained in the act so that no part will be inoperative or superfluous. A statute must also be interpreted according to its intent and meaning and not always according to its letter. Words and expressions which are implied may be added. *I. C. R. R. Co. v. C. B. & N. R. R. Co.*, 122 Ill. 481; *Farwell v. Cohen* 138 Ill. 232; *I. C. R. R. Co. v. Chicago*, 138 Ill. 459; *People v. Chicago*, 152 Ill. 546; *Root v. Sinnock*, 24 Ill. App. 537; *Perry Co. v. Jefferson Co.*, 94 Ill. 215; *People v. Hoffman*, 97 Ill. 234; *Anderson v. C., B. & Q. R. R. Co.*, 117 Ill. 26; *People v. Blackwelder*, 21 Ill. App. 254; Part 1, Sec. 2, Chap. 131, entitled "Statutes," of the Revised Statutes of Illinois.

The word "may" in the expression "It (referring to the city council) may elect a temporary chairman in the absence of the mayor," found in Sec. 10 of Art. 3 of Chap. 24 of the Revised Statutes, means and should be read shall. *Kane v. Footh*, 70 Ill. 587; *Fowler v. Pirkins*, 77 Ill. 271; *James v. Dexter*, 112 Ill. 489; *Brokaw v. Commissioners*, 130 Ill. 482.

The expression temporary absence, used in Sec. 4, Art. 2, should be read, and means temporary absence from the city. The expression in the absence of the mayor, used in Sec. 10, Art. 3, should be read and means in the absence of the mayor from the meeting. *Cline v. Seattle*, 43 Pac. Rep. (Wash.) 367.

When the mayor is absent from the meeting of the city council, the council can not by the selection of a mayor *pro tem.* thereby clothe such mayor *pro tem.* with the power of the mayor unless one of the specified contingencies under which the mayor *pro tem.* can act clearly exists. A plea justifying under such an appointment must specifically and clearly show such contingency. *State ex rel. Clark v. Board of Health of Trenton*, 17 Am. & Eng. Cor. Cases (N. J.) 296.

Courts are zealous in protecting the rights, prerogatives and functions of an executive officer elected by the people. *Mayor of Detroit v. Moran*, 46 Mich. 213; *State v. Graham*, 21 Am. Rep. 551.

On August 2, 1898, no emergency existed which would warrant the calling into exercise of any extraordinary power of appointment, for even on the theory of respondent's plea that the ordinance of December 10, 1892, is still in force, in so far that it fixes the term of city marshal at one year, yet it is undeniably a fixed rule of law in this country that in the absence of an express prohibition to the contrary an officer appointed for a certain term holds over until his successor is legally appointed and qualified, and in such case he holds as an officer *de jure*. *People v. Trustees of Fairbury*, 51 Ill. 149; *Forristal v. People*, 3 Ill. App. 470; *People v. Hill*, 7 Cal. 97; *Stratton v. Oulton*, 28 Cal. 45; *People v. Stratton*, 28 Cal. 382; *City of Central v. Sears*, 2 Col. 588; *State v. Fagin*, 42 Conn. 32; *Walker v. Ferrill*, 58 Ga. 512; *State v. Harrison*, 16 N. E. R. (Ind.) 386, and authorities there cited; *Walsh v. Commissioners*, 89 Pa. St. 419; *Throop on Public Officers*, Sec. 325, and authorities cited; *Dillon on Mun. Corporations*, Vol. 1, Sec. 219, and authorities cited; *Tiedeman on Mun. Corporations*, Sec. 81; *Am. and Eng. Ency. of Law*, Vol. 19, p. 562.

A. B. COON, E. D. SHURTLEFF and BOTTSFORD, WAYNE & BOTTSFORD, attorneys for appellee, contended that the city council were the sole and best judges of the necessity of selecting a mayor *pro tem.*, instead of a chairman, and having so selected a mayor *pro tem.*, the statute conferred on him

all of the powers of the mayor. Section 4 of Article 2 of Chapter 24, S. & C. R. S.; *State v. Walker*, 68 Mo. App. 110, 117.

Even though the ordinance of May, 1895, was all of the legislation in force in 1897 or in 1898, the subject of the city marshal, and the ordinance of 1892 in regard to the "Police Department," was, by re-organization, entirely repealed, yet the ordinance of May, 1895, providing for the "appointment of a city marshal," not in any manner fixing the term of said office, the term, as left by the ordinance of 1895, is "at the will" of the appointing power (that is the mayor and city council), and not for a period of two years. See *The People v. Carrique*, 2 Hill (N. Y.), 98; *Penn. Co. v. Dunlap*, 13 N. E. Rep. 496; *Williamson v. City of Gloucester*, 19 N. E. Rep. 348; *People v. Robb*, 27 N. E. Rep. 267.

The reorganization of a city or village from a special charter, to the general law for reorganization, while it may, and does abrogate all such offices, under the special charter that are not provided for in the general law, and determines the tenure of all such officers, yet such change and reorganization does not abrogate the police department of any city or village so reorganizing, nor does it repeal any of the regulations of the police department. *Sheridan et al. v. Colvin et al.*, 78 Ill. 237.

Counsel insisted that the mayor and relator having been governed in 1897 by the terms of the ordinance of 1892, in certifying as to the amount of the bond, approving it and recognizing its validity, that the term of city marshal was only for one year, had expired in May, 1898, by reappointing him, and also by having appointed from time to time special policemen under said ordinance, that he ought to be estopped from claiming that none of the provisions of the ordinance of 1892 were in effect in 1887 or 1898. *Pursel v. State ex rel. Roney*, 12 N. E. Rep. 1003, 1004, 1005; *People v. Waite*, 70 Ill. 25, 27.

The office of mayor is not a franchise, and like every other office created by statute, confers no vested right, but is held simply for the benefit of the people. *Tiedman on*

Municipal Corporations, 67; Dillon (4th Ed.), Sec. 208; Kreitz v. Behrensmeyer, 149 Ill. 496, 503; People v. Loeffler, N. E. Ill. Rep. 785.

MR. PRESIDING JUSTICE DIBELL, delivered the opinion of the court.

This is an information to test the right of H. H. Blair to hold and execute the office of city marshal of the city of Marengo, which it was averred he had usurped without right. Blair filed a plea, setting up in detail his title to the office. The relator, Lester Barber, mayor of said city, demurred to the plea. The court overruled the demurrer, the relator abided thereby, and judgment for costs was rendered against him, from which judgment he appeals. The question presented, is whether the plea shows Blair had title.

The briefs on each side concede that till 1893 the inhabitants of Marengo were incorporated as a town under a special charter. (Private Laws of 1857, p. 331.) The plea shows an ordinance was adopted in 1892 concerning the police department, which provided for a city marshal, to be appointed at the first regular meeting of the town trustees in May of each year, to hold office during the municipal year, give bond in the sum of \$1,000, with security to be approved by the president, and with certain prescribed duties. In 1893 Marengo became incorporated under the general law. In 1895 its city council adopted an ordinance which created the office of city marshal; authorized the mayor to fill it by appointment, subject to the approval of the city council; and enacted that the city marshal "shall perform such duties as shall be prescribed by the city council for the preservation of the public peace, and the observance and enforcement of the ordinances and laws;" have the power of a constable and serve civil process within the corporate limits. The ordinance did not fix the term of the office. On May 11, 1897, Joseph Dunwoody was appointed and confirmed city marshal, and thereafter did certain things by way of qualifying. On May 17, 1898, he was again nominated as city marshal. On June 21, 1898,

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the nomination was rejected. On August 2, 1898, the mayor was absent from a council meeting on account of illness, and the council appointed Alderman Eshbaugh mayor *pro tem*. The latter nominated Blair as city marshal, the council immediately confirmed the appointment, and Blair gave bond, which was approved at that meeting, and took the oath of office. The plea seeks to show that Dunwoody never properly qualified, and therefore was never legally city marshal; that the ordinance of 1892 remained in force, except as modified by the ordinance of 1895, and therefore the term was but one year, and if Dunwoody ever held the office his term expired in May, 1898; that at the meeting of August 2, 1898, the council had power to appoint Eshbaugh mayor *pro tem*., and the latter had power to make the nomination.

The plea avers that by reason of defects in Dunwoody's attempt to qualify in May, 1897, he never became a legal city marshal, and the office remained legally vacant. The plea does not state directly whether Dunwoody thereafter undertook to and did act as city marshal and perform the duties of that office, though that may fairly be inferred from the absence of allegation, but it sets out proceedings of the council showing that body by a vote, recognized him as a *de facto* city marshal, and directed that he be paid for services performed by him up to June 11, 1898, "while a *de facto* officer." With this in the plea and in the absence of other allegation, it must be assumed against the pleader that immediately upon Dunwoody's appointment, confirmation and giving bond in May, 1897, he entered upon the duties of the office of city marshal and thereafter continued so to act till Blair obtruded into the office, as there is no allegation Dunwoody ever ceased to act as city marshal. Blair can not here assail Dunwoody's title for irregularities in the manner of qualifying, for Dunwoody is not a party and his title is not in issue. The question whether Dunwoody had a perfect title to the office can only be raised by quo warranto against him. *Burgess v. Davis*, 138 Ill. 578. As he was appointed and confirmed, gave bond and

entered upon the duties of his office, we are of opinion he is to be considered, for the purposes of this suit, a *de jure* officer.

If, however, we treat the supposed defects as open to investigation here no different result is reached. The defects alleged in the argument are that Dunwoody's bond was not approved by the council and that he did not take an official oath. The instrument set out in the plea shows he did execute a bond with a surety, that the signers acknowledged it, that it was approved by the mayor and filed with the clerk. The acknowledgment is dated the day after it was filed, but the plea does not charge Dunwoody withdrew it from the files, and we may therefore fairly assume it was acknowledged at the clerk's office. When Dunwoody filed the bond with the city clerk he in effect presented it to the council, as that officer is the keeper of the records and files pertaining to the business of the council. If Dunwoody had brought the bond to the council meeting his orderly course would have been to hand it to the clerk. He did deposit it with the clerk, and it then became the duty of the council to act upon it. The plea does not aver that the bond was insufficient in form or security, or that any reason for disapproving it existed, or that the council was ignorant that it was in the hands of the clerk. While the council did not formally approve the bond, its records set out in the plea show it treated Dunwoody as city marshal and voted him pay as such for more than a year thereafter. It thus treated the bond as sufficient. The action of the council implied an approval. *Bartlett v. Board of Education*, 59 Ill. 364; *Green v. Wardwell*, 17 Ill. 278. The ordinance of 1895 did not fix the penalty of the official bond, but section 4 of article 6 of the general act allows the penalty to be fixed by resolution or ordinance. The plea shows there was no other ordinance, but does not aver but what the penalty was fixed in this case by resolution.

The plea does not aver Dunwoody did not take an oath of office. It does set out the bond, and attached thereto a

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paper apparently prepared by some one for the signature of the city clerk, dated in June, 1898, which states no oath of office is on file in the office of the clerk, and none was given to his knowledge. But as set out in the plea in the record before us, this paper is not signed by any one. If it had been signed it was no proper part of an official certificate. The incorporation into the plea of this unsigned statement attached to the bond is not an allegation by the pleader that Dunworthy did not take an official oath. The plea also sets out a lengthy notice, signed by certain aldermen, addressed to the mayor and clerk and Dunwoody, which recites that Dunwoody never took an official oath; and also certain resolutions adopted by the council June 21, 1898, which declare, among other things, that Dunwoody had never taken an oath of office. In our judgment the insertion of these papers in the plea is not equivalent to an allegation by the pleader that Dunwoody did not take an official oath. It merely avers that there are certain papers and proceedings which assert that he did not. In the absence of averment we must assume that Dunwoody's title was not defective in that respect. We therefore hold that respondent is not entitled to attack Dunwoody's title for mere irregularities, and that the defects he argues are not shown by the plea, to exist.

What was the term of office to which Dunwoody was appointed in May, 1897? The ordinance of 1892 made the term of city marshal expire with the municipal year. The plea avers the city was incorporated under the general law in 1893, but that the ordinance of 1892 remained in full force till the beginning of this suit, except as modified by the ordinance of 1895. Whether incorporation under the general law repealed the previous ordinance is a question of law. The statement of the plea that said ordinance of 1892 remained in force is not an allegation of fact, but a legal conclusion. A demurrer admits only such facts as are well pleaded. It does not admit the pleader's conclusions of law, nor the construction placed by him upon the statutes, nor the correctness of the inferences from the facts stated.

(McPhail v. People, 160 Ill. 77; Fish v. Farwell, 160 Ill. 236; Craig v. Russell, 115 Ill. 488; Henderson v. Farrelly, 16 Ill. 137; 1 Chitty's Pl. 662.) We consider it settled by The People ex rel. v. Brown, 83 Ill. 95, and Crook v. People ex rel., 106 Ill. 237, that the adoption by Marengo of the general law for the incorporation of cities in 1893, operated *eo instanti* to abolish the office of city marshal. Under the general law there can be no city marshal unless the city council, after incorporation thereunder, adopts, by a two-thirds vote, an ordinance providing for such an officer and directing whether he shall be appointed or elected. Hence, where a municipality under a special charter, and with such an office and officer, reorganizes under the general law, the continuance of the office and officer would be repugnant to the new law. To permit the prior ordinance establishing the office of city marshal to remain in force might defeat the intent of the general law. There might not be two-thirds of the alderman under the new organization who would vote to establish the office, and yet there might not be a majority vote to repeal the old ordinance. In order that the new act may be carried into complete effect it is necessary that the adoption of the general law shall operate to abolish the old office of city marshal and to terminate instantly the functions of the prior incumbent. Then the city council of the new city is left in a position to legislate with entire freedom upon the subject, and such is the intention of the statute. When the office of city marshal of Marengo was abolished by incorporation under the new law, the provisions of the ordinance of 1892 relating to the office necessarily fell with it. We are unable to see the force of the argument that though the office was abolished yet the ordinance, establishing the office and fixing its duration and duties and the manner of choosing the incumbent, remained in force. We hold the ordinance was repealed in 1893, so far as it related to the office of city marshal. The ordinance of 1895 indicates that the council so understood. Its language did not refer to an office already in existence, but in express terms created the office of city marshal. It

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did not direct a performance by the city marshal of the duties theretofore prescribed by the old ordinance, but imposed duties which "shall be prescribed by the city council." The framers of that ordinance indicated by its terms that they were establishing an office not then in existence.

Section 3 of article 6 of the general law enacts that the council may by ordinance prescribe the term of appointive offices, but that the term shall not exceed two years. Dunwoody was appointed and confirmed as city marshal, and entered upon the duties of that office, without the term of said office having been then or since fixed by ordinance. In May, 1898, the mayor renominated him, but he was not confirmed. No doubt the mayor at that time supposed the ordinance of 1892 was in force. If Dunwoody's term did not in fact expire in 1898 the mayor's unnecessary act of renominating him did not mislead or injure any one, and no ground of estoppel against the mayor or Dunwoody appears in the plea. The question then is, what was the term of the city marshal under said ordinance of 1895, and the statute? Our conclusion is, the appointee was entitled to hold the office two years unless the council during the said two years by ordinance prescribed a shorter term. This could not be done by resolution, because the statute requires that the term be fixed by ordinance. Therefore the resolutions adopted by the council June 21, 1898, declaring the office of city marshal vacant, did not fix or affect Dunwoody's term. Under section 7 of article 2 of the general act the mayor may temporarily remove an officer and file charges, but no such action is alleged here. The averments in the plea that there was a legal vacancy in the office from and after May 17, 1898, are mere conclusions of the pleader, not admitted by the demurrer. We therefore hold Dunwoody's term was two years from May, 1897, subject to be cut short by a future ordinance fixing a lesser term. On August 2, 1898, there was, therefore, no vacancy to which respondent could be appointed, and the action then taken was nugatory and conferred upon him no right to exercise the office of city marshal. This conclusion defeats the plea, and disposes of the case before us.

We will, however, further consider the case as if the term was one year and expired in May, 1898. Did the city council have power to appoint Eshbaugh mayor *pro tem.* on August 2, 1898, and thereby confer upon him the power of nomination? Certain allegations of the plea as to the mayor's absence from the council meeting at that date are mere narration of hearsay evidence, and other allegations are expressly on information and belief. This is not good pleading in an action at law. The only allegation of fact well pleaded on this subject is the following: "Respondent avers that the mayor of said city was temporarily absent from said meeting during the entire time of said meeting, and that the said mayor was disabled by sickness from attending the said meeting." Did the fact so alleged authorize the council to appoint an alderman mayor *pro tem.* and endow him with the authority of mayor?

Article 2 of the general, incorporation act provides that the mayor shall reside within the city limits and hold his office for two years; that if he shall remove from the limits of the city his office shall thereby become vacant; that if a vacancy of one year or over shall occur it shall be filled by election, and if less than one year the council shall elect one of its members mayor, with all the rights and powers of mayor, till the next annual election. Section 4 of said article 2 enacts: "During a temporary absence or disability of the mayor, the city council shall elect one of its members to act as mayor *pro tem.* who, during such absence or disability, shall possess the powers of mayor." Section 6 says the mayor shall preside at all meetings of the city council. Section 10 of article 3 provides that the city council "may elect a temporary chairman in the absence of the mayor." To determine whether the plea shows the mayor was absent or disabled we must ascertain his powers and duties, and where they may properly be exercised and performed. The powers and duties of mayor are found in various parts of said act. He is the chief executive officer of the city, directed to "take care that the laws and ordinances are faithfully executed." Within the city limits he

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has the power of a sheriff to suppress disorder and keep the peace. He must perform all duties prescribed for him by law and the city ordinances; he has the power to nominate all non-elective officers and to fill all vacancies in offices, except those of mayor and alderman, subject to the approval of the council. He has the right to remove, temporarily, any officer he has appointed, and to release any person imprisoned for the violation of the city ordinances. He has power at all times to inspect the records and papers of every agent, employe and officer of the city. He is required to give the council annually and from time to time, information relative to the affairs of the city, and to recommend such measures as he deems expedient. He may call out the male inhabitants to aid in enforcing the laws and ordinances, and may call out the militia to suppress riots, subject to the authority of the governor. All ordinances adopted by the council must pass under his supervision and are subject to his approval or veto. He is a conservator of the peace, may make arrests, and administer oaths. No city funds can be paid out of the treasury without his signature to the warrant therefor.

From this incomplete resume it is manifest the mayor has many duties to perform and many powers to exercise outside the council chamber. In suppressing disorder, inspecting the books and papers of the various officers, enforcing the laws and ordinances, considering the qualifications of citizens for offices, over which he has the nominating power, preparing annual and other messages to the council relative to city affairs, considering what measures it is expedient he shall recommend to the council, examining ordinances previously passed to determine their legality and propriety, and whether he will approve or veto, he is performing functions which can not be suitably exercised while he is presiding over the council in session. The performance of these duties is just as binding upon him as his duty to preside at the council meeting. Sometimes these duties may make his presence in another part of the city necessary or proper at a time appointed for a

council meeting. The plea does not aver that the mayor was unable to perform any of the duties of his office on August 2, 1898, except to attend the council meeting. We must assume the plea states the entire disability under which the mayor was then laboring, and that the mayor was at that date entirely competent to perform every duty of his office except that one. For aught appearing in the plea, the mayor may then have been engaged in some other duties of his office; he may then have been considering the qualification of some other person for city marshal, or preparing a message to the city council, or considering the legality of some ordinance then pending before him for approval or veto, or may have been acting upon some application to discharge a city prisoner.

The construction contended for by respondent would produce great confusion. There can not be two acting mayors of the city at the same time. During the one or two hours the mayor *pro tem.* is presiding, if he is lawfully appointed, every act done elsewhere by the regular mayor as such must necessarily be void. If the latter is at his office or home preparing an important veto message, the mayor *pro tem.* while in the chair can sign the ordinance. He can remove officers the mayor has appointed, fill all vacancies in appointive offices, veto ordinances the mayor intended to sign, and revolutionize the policy of the mayor. But the instant the council adjourns the power of the mayor *pro tem.* must, in a case like the present, necessarily cease, for the regular mayor is in the city and just as able as the *pro tem.* mayor to perform all the other duties of the office. If the powers of the mayor *pro tem.* do not then cease, how long may he continue to act after the council adjourns, where the mayor is in the city, competent for all his other duties? Many other examples might be given of the confusion which would result from the position here taken by the respondent.

In our judgment the legislative intent was not what respondent supposes. While the mayor resides in the city he is not required to always remain within its limits. He may be rightfully absent from the city on business or

pleasure; when he is outside the city there is no one present to perform the functions of his office, and the necessity exists for a mayor *pro tem*. The disability referred to in section 4 of article 2 of the general law we are of opinion is not a disability to perform some one of his many duties, but a temporary disability to act as mayor; such a disability as is produced by serious and continued illness, temporary insanity and the like. In case of absence from the city or of such disability, when there is no one who can act as mayor, it becomes the duty of the council to elect one of its number mayor *pro tem*. and he will possess the powers of mayor till the mayor returns to the city or so far recovers his health as to be able to resume the duties of his office. If, however, he is present in the city acting as mayor or able to perform the duties of that office generally, but is absent from a council meeting, whether because he merely chooses to be absent, or because he is engaged in city business in another part of the city, or because he is ill, then, in our judgment the power of the council in that respect is confined to electing a temporary chairman, who will possess the authority of presiding officer only and not of mayor. This construction gives effect to each section of the statute and does not lead to confusion.

It is further contended that the mayor had been derelict in his duty to nominate a city marshal; that the preservation of public order demanded the appointment of such an officer, and that this justified the council in taking the reins of power from the hands of the mayor and appointing a mayor *pro tem*. who would make a nomination.

The plea does not show such a state of facts, nor in our judgment does the law permit the council to redress its own grievances in such fashion. First. It does not follow from the facts pleaded that after May, 1898, the office of city marshal became legally vacant, so that there was no one who could legally discharge its duties and preserve order in the city. Municipal officers appointed or elected for a fixed term hold over till the election or appointment and qualification of their successors unless a contrary legis-

lative intent is manifest. (Dillon on Municipal Corporations, Secs. 158, 159.) No such contrary legislative purpose appears in the general act for the incorporation of cities. Therefore Dunwoody (on the assumption we are now making, that his term was one year) held over and was legally entitled to the possession of his office and to execute its duties till his successor was appointed and qualified; and the council could not, by the resolutions of June 21, 1898, drive him out of that office before his successor was selected and qualified. The council had no authority to take such action. Second. The mayor and council seem to have been about equally responsible for the delay. If Dunwoody's term was under the ordinance of 1892 (as we are now assuming), and ended with the municipal year, the plea does not state when that year closed. Dunwoody was first appointed May 11, and filed his bond May 26, 1897. At the council meeting May 17, 1898, the mayor made several appointments which were confirmed, and reappointed Dunwoody for city marshal, which appointment, the record of that date set out in the plea says "was not confirmed." Neither the plea nor the record says the appointment was voted upon and rejected at that meeting, and evidently no action was then taken, for the plea avers, and the record set out therein says, that on June 21, 1898, the council voted not to approve the appointment of Dunwoody as city marshal. The council thus took one month and four days to determine whether or not it would confirm Dunwoody, for which delay the mayor was not responsible. From June 21 to August 2, one month and eleven days, the delay in making another nomination is chargeable to the mayor; that is, at the latter date he had then delayed seven days longer than the council. But certainly he was entitled to a reasonable time after the rejection of his first nomination in which to select a new appointee, before any neglect of duty could be imputed to him. The facts therefore did not justify the council in charging the mayor with neglect of duty. Third. We can not hold it to be the law that if the mayor delays an appointment, either an unreasonable time, or longer than it suits the pleasure of the council, that body

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thereby acquires the right to deprive him of his functions and appoint one of its own number to take the desired action. The courts furnish the remedy to compel an officer to perform his duty. The law has not lodged with the city council the power here asserted for it in argument.

We are therefore of opinion that Dunwoody's term was two years from May, 1897, and that if it were but one year the appointment of a mayor *pro tem.* was unauthorized by law, and Eshbaugh only acquired the authority of chairman and his action in nominating respondent was void, and that Blair had no title to the office.

The judgment is reversed and the cause remanded to the court below, with directions to sustain the demurrer to the plea, and enter judgment of ouster. Reversed and remanded.

Matt W. Pinkerton v. Walter Martin.

182 569
187 82

1. **ARREST**—*Liability of Employer for the Acts of Employees.*—A proprietor of a detective agency ordering an illegal arrest, and confinement in his own office, by his own employes, ought not to be permitted to escape responsibility if outrage is committed, on the ground that he did not specifically order it.

2. **SAME**—*Where the Law Implies Malice, Probable Cause no Justification.*—Where a person was decoyed into Chicago upon false pretenses, illegally arrested and unlawfully confined for two weeks, being denied all communication with his friends or the outside world, and with no attempt whatever to have a legal investigation as to his guilt of any crime, the law will imply malice, and probable cause furnishes no justification.

Trespass, for an alleged malicious arrest and false imprisonment. Trial in the Circuit Court of Kane County; the Hon. CHARLES A. BISHOP, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the December term, 1898. Affirmed. Opinion filed April 11, 1899. Rehearing denied May 18, 1899.

CHARLES WHEATON, attorney for appellant.

CHESTER M. DAWES and HOPKINS, THATCHER & DOLPH, attorneys for appellee.

MR. JUSTICE CRABTREE delivered the opinion of the court.

This was an action of trespass for an alleged malicious arrest and false imprisonment of appellee by appellant. The suit was originally brought against appellant, together with H. O. Devereaux and Charles Mitchell, of Chicago, also A. F. Beverly and Ole Oleson, of Kane county.

The amended declaration avers that the defendants on the 23d day of October, 1893, with force and arms, maliciously made an assault upon the plaintiff, and maliciously seized and laid hold of him, and maliciously imprisoned the plaintiff in the detective office of Matt W. Pinkerton, at Chicago, and maliciously ill treated him, etc. The defenses interposed were the general issue, release and a plea of justification under a warrant issued by a justice of the peace upon the complaint of Ole Oleson in writing, charging the plaintiff with having committed the crime of arson. Replications were filed setting up the alleged illegality of the arrest and detention of the plaintiff; rejoinders were interposed upon which issues were formed as to the legality of the arrest and detention. Before the trial the suit was dismissed as to Beverly and Oleson, leaving appellant and Devereaux as the only defendants to be proceeded against, Mitchell never having been served with process.

On the first trial the jury disagreed, but on the second trial the jury returned a verdict finding appellant guilty, Devereaux not guilty, and assessing appellee's damages against appellant at \$850. A motion for new trial was overruled by the court and judgment entered on the verdict, to reverse which this appeal is prosecuted.

It appears from the evidence that some time in the fall of 1893, a creamery factory at St. Charles operated by Chuning Brothers, was destroyed by fire which was suspected to be the work of an incendiary. That appellant, who was carrying on a detective agency in Chicago, was employed by parties interested in the creamery property to ferret out the suspected crime and arrest the criminals if found. The suspicion of the detectives in the employ of appellant, for some reason, appear to have fallen upon

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the Chunings, and appellee being thought to have some connection with them and to know something of the alleged crime, it seems to have been determined to get him into Chicago, have him arrested on a charge of having committed the crime, and then get him into appellant's "sweat box" to extort from him his supposed knowledge of the guilty parties. In pursuance of this scheme, we think the evidence shows appellee was decoyed into Chicago by a ruse, devised by appellant, his superintendent or employes, and there arrested upon a warrant issued by a justice of the peace of Cook county, on complaint charging a crime committed by appellee in Kane county, said Charles Mitchell, an employe of appellant, being specially deputed to make the arrest. Mitchell found appellee at the Chicago Opera House Block, where he had been decoyed on a pretense of meeting a person calling himself Hines, but who was in fact Devereaux, appellant's superintendent, and was there arrested. Instead of taking appellee to the office of the justice, as commanded by the warrant, Mitchell took him to the Pinkerton office, although the route traveled was immediately past the door of the justice's office. Mitchell testified that in taking appellee to the Pinkerton offices and not to the office of the justice, he acted under the orders of his superiors. Appellee testifies that after they got him to the Pinkerton office he was searched, all his papers and every thing he had was taken from him, his private letters read, and he was then put into an inner office. That Devereaux told him he was in great danger of going to State's prison for five years, but that if he would tell all he knew they would send him anywhere he wanted to go, and would pay all his expenses. Appellee demanded his liberty, denying all knowledge of the alleged crime; he wanted to inform his friends of his whereabouts but this was denied him. He had an uncle occupying a responsible position in the city of Chicago, and desired to communicate with him, and let him know where he, appellee, was. Those having the custody of appellee permitted him to write a letter to his uncle, asking the latter to send him a lawyer, but the letter appears never to have been sent or allowed to reach the

uncle; nevertheless, a person appeared who tried to make appellee believe he was a lawyer sent by the uncle in response to the letter, but who did nothing for appellee and only talked with him about the alleged crime. He was evidently acting for appellant and not for appellee.

During the time appellee was being held in custody, appellant visited him personally on several occasions, and by threats and intimidation, tried to induce him to tell all appellant claimed appellee knew about the fire. Appellee further swears that during the two weeks he was kept in custody at the Pinkerton offices, he was in constant confinement. That at night his clothes were all taken from him and locked in a closet and that on four different occasions he was chained and shackled to the bed by the persons having him in charge. This latter complaint is denied by those who had the custody of appellee, but it was for the jury to say whom they believed under all the circumstances. It is perhaps unnecessary to further detail the outrages perpetrated upon appellee and not denied by appellant, but in our opinion they were of such a character as to call for the severest condemnation. For two weeks appellee was kept in close confinement without an opportunity of letting his friends know where he was. Mr. H. D. Wylie, his uncle, became greatly alarmed about appellee, and advertised in the newspapers for him and put the matter into the hands of the police, fearing he had been the victim of some foul play. Finally, learning through the postoffice at St. Charles that appellee's mail had been ordered forwarded to lock box 588, Chicago, Mr. Wylie ascertained that this was appellant's private postoffice box, and then he went to the Pinkerton offices and demanded to see appellee. Devereaux, the superintendent, denied that appellee was there, and said he had gone to Geneva. Subsequently, on the same evening, one of appellant's employes took appellee to Geneva where, for the first time, regular process was issued for his arrest; he was afterward indicted, and after three terms of court had passed at each of which he demanded a trial the indictment against him was *nolle prossed* and no further proceedings were had against him. There is not, in the

whole record, any evidence that appellant or his employes had even a well founded suspicion that appellee had been guilty of any crime. They appear to have thought he knew something against the Chunings, which they desired to have him tell, and for the purpose of extorting some confession from him as to guilty knowledge, they perpetrated upon him one of the greatest outrages which have ever come before the courts of this State in cases of this character. One of the points made for reversal is that the damages are excessive, but we think it idle to argue that a verdict and judgment for \$350 are excessive, even upon the facts admitted by appellant, while if the jury believed one-half of the story told by appellee, they would have been warranted in giving very much larger damages. Attempt is made in argument to show that some of the indignities appellee claims were perpetrated on him, were not authorized or ordered by appellant. We are satisfied from the evidence that he is responsible for the conduct of his employes in the treatment of appellee from the time he was arrested until his final discharge from their custody. One ordering an illegal arrest and confinement in his own office, by his own employes, ought not be permitted to escape responsibility, if outrage is committed, on the ground he did not specifically order it.

It is objected that the court improperly excluded from the jury a certain letter written by appellee to his brother while still in the custody of appellant. The court excluded the jury, and in their absence heard evidence as to the circumstances under which the letter was written, and the reasons given by appellee for writing it. While it would not have been improper to have admitted the letter and let it go to the jury with the appellee's explanations, we do not regard its rejection as so far erroneous that the judgment should be reversed for that reason alone.

The so-called release went to the jury and was no doubt considered by them in connection with all the other evidence in the case and given such weight as they thought it entitled to.

It is argued that there is no proof of express malice or want of probable cause. We think the authorities cited by counsel on this question are not in point and have no bearing when applied to the facts of this case. Here, the arrest and detention were in themselves unlawful. Appellee was decoyed into Chicago upon false pretenses, then illegally arrested and unlawfully confined for two weeks, being denied all communication with his friends or the outside world, and with no attempt whatever to have a legal investigation as to his guilt of any crime. Under these circumstances the law implies malice, and probable cause would furnish no justification. This proposition is elementary, and it is scarcely necessary to cite authorities in its support. *Johnson v. Von Kettler*, 84 Ill. 315.

We think there is no error in the fifth instruction given on behalf of appellee, and that the evidence was amply sufficient to warrant the court in giving it to the jury. Nor do we find any other error in the instructions.

One of the grounds of the motion for a new trial was the alleged surprise of appellant, at a portion of the testimony of his superintendent, Devereaux, as to appellant's presence in Chicago during the time appellee was confined in his office, and the affidavit of appellant was filed in support of this ground of the motion. We think the affidavit was not sufficient to require the court to give a new trial on the ground of surprise, and otherwise there appears to be no reason for allowing the motion.

As we have already said, considering all the circumstances of indignity appearing in the evidence, the damages were not excessive, and the judgment must be affirmed.

Benjamin F. Herrington v. Nels O. Cassem.

1. CONTEMPT OF COURT—*What is a Sufficient Defense.*—When a party is brought before the court on attachment for contempt in refusing to obey a previous order for the payment of money, it is sufficient to entitle him to be discharged to show that his disobedience has not been

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willful, but solely on account of his pecuniary inability, or some other misfortune over which he has no control.

2. **IMPRISONMENT FOR DEBT—*Constitutional Rights.***—No person can be imprisoned for debt unless upon refusal to deliver up his estate for the benefit of his creditors in such manner as shall be prescribed by law, or in cases where there is strong presumption of fraud.

Contempt Proceedings.—Trial in the Circuit Court of Kendall County; the Hon. CHARLES A. BISHOP, Judge, presiding. Finding and judgment against defendant; error by defendant. Heard in this court at the December term, 1898. Reversed. Opinion filed April 11, 1899. Rehearing denied May 18, 1899.

BENJAMIN F. HERRINGTON, plaintiff in error, *pro se*.

MCDUGALL & CHAPMAN, attorneys for defendant in error.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was a proceeding against plaintiff in error for contempt of court in failing to pay to defendant in error the sum of \$169.35, in compliance with an order of the Circuit Court of Kendall County.

It appears from the evidence in this case that in the year 1888, William H. Hopkins filed a bill in the Circuit Court of Kendall County against George M. Hollenback, executor, etc., et al., to foreclose a mortgage on certain premises described in said bill. On June 20th of that year, a decree of sale was entered, and said Hollenback, being then master in chancery of said county, plaintiff in error was appointed special master to execute the decree. Plaintiff in error afterward, as such special master, sold the premises in pursuance of said decree and Hollenback became the purchaser. The purchaser having failed to comply with the terms of the sale, the same was set aside and another sale ordered by the court, and in accordance with such order plaintiff in error, as such special master in chancery, on the 23d day of March, 1889, sold said premises to Nels O. Cassem, defendant in error. Owing to some matters connected with the suit which were afterward brought to the attention of the

court, and with which neither plaintiff in error nor defendant in error had anything to do, the court refused to confirm the second sale and ordered the money which had been paid to plaintiff in error' by defendant in error to be returned to the latter.

This order was complied with so far as possible. Plaintiff in error had retained out of moneys in his hands the sum of \$344.35, which he claimed to be due him as his fees and commissions earned on the sales of said premises; but the court directed that the amount allowed for commissions be reduced to the sum of \$175, leaving the sum of \$169.35 in the hands of plaintiff in error to be accounted for.

On May 2, 1893, an order was entered directing plaintiff in error to pay to defendant in error, or to the clerk of the court for him, the said sum of \$169.35 within sixty days from that date, and that on his failure so to do, that he, the said plaintiff in error, be held in contempt of court. From this order plaintiff in error prayed an appeal to the Supreme Court, which was allowed by the court but not perfected.

Plaintiff in error having failed to pay said sum of money in compliance with the terms of said order, the court afterward, on November 16, 1897, on the petition of defendant in error, entered a rule on plaintiff in error to show cause by the first day of the next term of court why he should not be dealt with for contempt of court for his failure to comply with such order. Plaintiff in error filed his answer to the petition and afterward, on the 14th day of November, 1898, a hearing was had and plaintiff in error was adjudged guilty of contempt of court and ordered to stand committed to the common jail of Kendall county until he should pay the said sum of money to said defendant in error or to the clerk of said court. This writ of error seeks a reversal of said judgment. Many errors are assigned, but the only question necessary for us to consider is whether plaintiff in error was, at the time the order was entered, actually in contempt of court. In the answer which he filed to the petition of defendant in error, plaintiff in error stated among other things that he did not have any money in his posses

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sion or control belonging to defendant in error at the time he was ordered to pay said sum of \$169.35, nor has he had since in his possession or control any moneys belonging to said defendant in error.

He further states that long before and at the time of the making of the order for the payment of said money, he did not have any money of his own out of which he could have paid said \$169.35 to defendant in error, nor has he had any money since then of his own out of which he could have paid the same; that he has no money now out of which he could pay said sum or any part thereof, and that he is poor and has no property upon which he could obtain a loan to make such payment, and for said reasons he is unable to comply with said order. He further states that he has repeatedly tried, since the making of said order, to obtain a loan and satisfy said claim of \$169.35, but that owing to the stringency of the times he has been and is now unable to obtain such loan, and for that reason he was and is now unable to comply with said order. He denies that he is in contempt of any lawful order of said Circuit Court, or that he has willfully refused to obey any lawful orders thereof, and states "that if it was in his power he would gladly pay to said Nels O. Cassem said unjust sum of \$169.35, simply to buy his peace, not hereby admitting that the defendant is justly indebted thereon." From this answer it appears that plaintiff in error has always claimed and does now claim that the said amount of \$169.35, which he was ordered to pay, was justly due him for his commissions on said sales, but that notwithstanding that fact he would pay said sum in compliance with the order of the court if he were able to do so; that he has no funds of his own out of which he can make said payment, and that he has no property upon which he could obtain a loan; that he has repeatedly tried to obtain a loan of the amount named, but has been unable to do so. This answer was sworn to by the plaintiff in error, and on the hearing was admitted in evidence without objection.

On the hearing no evidence was introduced to controvert

the facts stated in the answer, and it must therefore be taken as true. In the case of *O'Callaghan v. O'Callaghan*, 69 Ill. 552, it was held, that when a party is brought before the court on attachment for contempt in refusing to obey a previous order of that court for the payment of money, it is sufficient to entitle him to be discharged to show that his disobedience has not been willful, but was solely on account of his pecuniary inability or some other misfortune over which he had no control. This doctrine is approved by our Supreme Court in *Dinet v. The People*, 73 Ill. 183, and *Blake v. The People*, 80 Ill. 11.

The Constitution declares that "no person shall be imprisoned for debt unless upon refusal to deliver up his estate for the benefit of his creditors in such manner as shall be prescribed by law, or in cases where there is strong presumption of fraud."

We are of opinion that the statement of the plaintiff in error as to his desire to pay the amount named in the order and his inability to do so, together with his disavowal of any intention of being in contempt of court are, in the absence of evidence showing a contrary state of facts, or raising a strong presumption of fraud, sufficient to purge him of contempt.

The order of the court below is therefore reversed.

George W. Lyon and Aaron Lyon v. Merchants National Bank.

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1. **EQUITY PRACTICE**.—*Where a Sworn Answer is Required.*—Where a sworn answer is required, and filed, denying the material allegations of the bill, it is evidence for the defendant, and the complainant can have no decree until the allegations of such answer are overcome by the evidence of two witnesses, or its equivalent.

Creditor's Bill.—Trial in the Circuit Court of Peoria County: the Hon. THOMAS. M. SHAW, Judge, presiding. Decree for complainant Appeal by defendants. Heard in this court at the December term, 1898. Reversed and remanded with directions. Opinion filed May 19, 1899.

Lyon v. Merchants National Bank.

FOSTER & CARLOCK, attorneys for appellants.

JACK & TICHENOR, attorneys for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

On October 21, 1891, the Merchants National Bank of Peoria obtained a judgment against George W. Lyon in the Circuit Court of Peoria County, for \$3,438.65 and costs upon three notes, dated December 23, 1889. Said notes were given by George W. Lyon as renewals of prior notes of J. S. Ely & Co., of which firm George W. Lyon became a member near the close of its business career. From the proofs, at least \$2,000, and perhaps all of said debt, was incurred by Ely & Co. before George W. Lyon went into the firm, but by later notes he became personally bound to pay the debt. Execution was issued upon said judgment and returned *nulla bona*. On April 22, 1892, the bank began this suit by filing a creditor's bill for discovery and relief against George W. Lyon, Aaron Lyon, Weston Arnold and Theodore Miller. The bill charged that in 1889 George W. Lyon was the owner of very many lots and undivided interests in lots and tracts of land in and about Peoria, described at length in the bill. For brevity we may say he owned either the whole of or some interest in the several pieces of real estate described as follows in the record, viz.: First, Jefferson Park Subdivision; second, Peoria Fair Subdivision; third, Highland Park Addition; fourth, Lincoln Place Subdivision; fifth, Selby Park Subdivision; sixth, the Washington street property; and, seventh, the home-
stead.

The bill alleged that in November, 1889, George W. Lyon, being largely indebted to complainant and others, in order to defeat his creditors, executed a number of deeds, by which he transferred all the above real estate, some of it to his father, Aaron Lyon, and the rest to his brother-in-law, Weston Arnold; and that said deeds were fraudulent; were for the purpose of hindering and delaying creditors; were

without consideration; and that the property was still held in trust for George W. Lyon, etc. The bill propounded to each defendant many specific interrogatories, called for an answer under oath, and asked a decree setting aside said deeds and subjecting the premises to the payment of complainant's execution. Each defendant filed a sworn answer, specifically answering the interrogatories, giving detailed statements of the deeds and the considerations therefor, and wholly denying the allegations of fraud, and denying that George W. Lyon had any further interest in the lands conveyed to Aaron Lyon, and that they were held in trust for him. Complainant filed replications, and the cause was referred to a master to take and report the proofs with his conclusions. Evidence was taken before the master in 1893 and in 1896, and in June, 1897, the master made a report holding all the conveyances fraudulent. Objections to the report were filed before the master, which he overruled. He then filed his report, and defendants filed exceptions which were heard before the court. The pleadings showed, as did the proofs and the master's report, that the Jefferson Park, Peoria Fair and Highland Park properties, numbered by us 1, 2 and 3, were conveyed by George W. Lyon to Arnold, and the other properties to Aaron Lyon. The answer of Arnold claimed, and the proofs showed that the conveyances to him were to secure the payment, first, of certain notes owing by George W. Lyon to the German American National Bank, of which Arnold was cashier; and second, of a certain indebtedness to J. B. Greenhut. It may be these deeds to Arnold, being absolute on their face, were fraudulent as to creditors, under *Beidler v. Crane*, 135 Ill. 92; but the court below by its decree found there was no actual fraud in them; that the indebtedness they secured had not been fully paid; that there was no equity in the bill as to said conveyances to Arnold; sustained the exceptions to that part of the master's report, and dismissed the bill as to said conveyances; and in this court complainant has assigned no cross-errors. The conveyances to Arnold, therefore, stand unassailed here. The court also found that

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the Washington street property, numbered 6 above, had been sold by Aaron Lyon to A. V. Thomas before this suit was begun, and that the latter was a *bona fide* purchaser, and the court decreed that complainant had no equity as against that property. But the court found the conveyances from George W. Lyon to Aaron Lyon, of Lincoln Place, Selby Park and the homestead properties fraudulent as to the creditors of George W. Lyon, overruled the exceptions to the master's report as to them, and subjected said property to the lien of complainant's judgment and to sale under execution for the satisfaction thereof, as if the legal title were in George W. Lyon. This appeal seeks a reversal of that part of the decree.

The proofs show Aaron Lyon was a man of some wealth; that his son George was engaged in various speculations and business enterprises; that Aaron loaned George many sums of money for use in his business and in his speculations, for which he held George's notes, and some sums for which he held no notes; that he also signed many notes as security for George at banks and elsewhere; that in November, 1889, they figured up the amounts. George owed his father and the notes upon which Aaron was security for George and which George could not pay, and found the sum approximated \$22,000, besides a judgment in favor of one Pierce against George for \$2,153, which was a lien upon the homestead, and a mortgage thereon for \$2,380; that George's interests in the real estate here involved were worth about \$12,000; that they then agreed George should convey said real estate to his father and the latter should accept it in full satisfaction of all George then owed him and in satisfaction of the notes upon which Aaron was security for George, which Aaron should pay, and in satisfaction of said Pierce judgment, which Aaron should pay, and subject to mortgages which Aaron was to pay; that George made and Aaron accepted these deeds as absolute conveyances; that Aaron surrendered to his son the notes he held against him and has paid many of the other claims, and stands ready and able to pay the rest in due time. George, though

insolvent, had a right to pay his father in this manner. The sworn answers (which complainant had to overcome) and the proofs we have stated made a clear case that Aaron was lawfully entitled to own and hold the property conveyed to him by his son unless the case so made is overborne by other facts in evidence.

Complainant made Aaron Lyon and Weston Arnold its own witnesses. George W. Lyon testified for the defense. There were other witnesses on each side, but none whose evidence standing alone has any special tendency to support the decree. As we view it, the decree must stand or fall by the sworn answers and the testimony of the three witnesses just named. The family relation existed and subjects the dealings between the parties to suspicion. Certain notes given by George to his father, the existence and payment of which by these deeds is sworn to by Aaron and George, and which George and his attorney, W. S. Kellogg, testify were before the attorney when he drew the answers, and whose dates and amounts were stated in the answers, were not produced at the trial. George swore they were canceled when the deeds were made; that he had them till he gave them to his attorney to use in preparing the answers, and after the answers were sworn to took them home and they were afterward lost and could not be found after diligent search; and he gave reasons for believing they had fallen on the floor and that the housekeeper had thrown them upon the ash heap, where some other old papers were recovered, but not these notes. The inability to produce these notes is relied upon as a suspicious circumstance. Aaron Lyon was eighty-four years old when his evidence was taken. His wife had died in 1888, and thereafter he had failed in memory and in ability to do business alone. For sixteen years George, who was unmarried, had lived with him, and had transacted much of his father's business, loaning money for him, examining abstracts, drawing mortgages, etc., in which business Aaron was also assisted by his son-in-law Arnold. George charged his father nothing for helping him to do business either before or after these deeds

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were given. He paid his father no board, and before the deeds were made he charged his father neither board nor rent. After the deeds were made he helped to sell some of the lots for his father just as he had helped his father do business before. The title to some of these lots had stood in a trustee who did not know of the transfer from George to Aaron till it came time to make deeds to effect a partition, when he was told to deed to Aaron. For years before these deeds George had been in the habit of borrowing money freely from his father without giving a note at the time, and after several such loans were made they would figure up the amount of the debt and he would give a note for it. There were no book accounts of these temporary loans. Certain liens Aaron agreed to pay he did not pay directly, but caused the property to be sold at foreclosure and bought it in, in satisfaction of the liens. Part of the debts which the parties testified were considerations for these deeds, were debts to the German American National Bank, on which Aaron was security for George, and these debts were also secured by the deeds to Weston Arnold, which the court below sustained, and they were paid out of the proceeds of the property so deeded to Arnold. In one place George testified the debts he owed his father, and those which his father assumed, amounted to about \$22,000 besides the Pierce judgment and the mortgage on the homestead, while the property deeded to his father was worth about \$12,000 above the mortgages resting upon it. At another time he testified that there was about enough to make his father whole. We conclude that the meaning of the witness was that after deducting from his father's liabilities on his account what was secured by and paid under the deeds to Weston Arnold, there was about enough value in what he deeded to his father to make the latter whole. Aaron Lyon had become feeble in health and his memory had apparently failed, and he was unable upon the witness stand to state the full details of the considerations for which the deeds to him were made, though he gave the outlines of the transaction, and the details were proved by

George, and part of them by Arnold. George and Arnold, under protracted and searching examination and cross-examination, remembered details of the dealings which they had not stated in their answers to the bill, and they testified to some of the dealings in a manner slightly variant from the allegations of their answers.

The foregoing statement summarizes the circumstances from which it is argued the decree should be sustained. These facts are entitled to their proper weight in determining whether the conveyances to Aaron were fraudulent and whether any secret trust for George was reserved. Some of the circumstances proven are recognized as frequent accompaniments of fraud; others seem to us not subject to suspicion. It is not surprising that Aaron Lyon, in his extreme old age, could not give all the details of business transactions occurring quite a number of years before and which he had supposed closed and had dismissed from his mind. It is a matter of common experience that very old people forget the events of recent years long before they lose their hold upon the occurrences of earlier life. The later events make a slighter impression, or the mind is less able to retain them. We do not think it strange that George W. Lyon and Weston Arnold, upon a protracted examination as witnesses, recalled details which they did not remember when their answers were drawn, nor that such examination showed some paragraphs in the answers not completely accurate. We doubt if any attorney can draw a sworn answer upon complicated transactions of years before with such fullness of detail that a close cross-examination of his client will develop no other or different circumstances than those embodied in the answer.

After giving due consideration to every fact and circumstance in proof, the evidence leads our minds to the conclusion that George W. Lyon was heavily indebted to his father; that the evidence discloses with substantial accuracy the items of that indebtedness; that this realty was conveyed by George to Aaron and was received by Aaron in full satisfaction of said debts; that the debts were fully

equal to the value of the real estate so conveyed, and that no interest remained in George, and no secret trust of any kind therein was reserved for him. We are impressed with the conviction that as to the lands conveyed to Aaron Lyon, the sworn answers have not been overcome nor any case made for complainant; and as to the lands conveyed to Weston Arnold the correctness of the decree is not brought before us for review.

We have made no special comment upon the fact that Ely was an officer of complainant when it loaned Ely most, at least, of this money; that this was not originally the debt of George W. Lyon, and that he seems to have never been morally bound to pay it; because we think that by giving his note for the debt and suffering judgment to go against him therefor, he is precluded from questioning his liability to the bank, however unwise and even inequitable it may have been that he should become bound therefor. It is by no means clear from the record but what these conveyances were made and recorded before George first became bound for Ely's debt to complainant. If so, the deeds were not fraudulent as to complainant unless a secret trust in favor of George was reserved, and we find no such trust was reserved in the deeds to Aaron. The record certainly shows that the notes in judgment were given by George after these deeds were made, and that complainant's cashier knew of the deeds when he procured George's signature to said notes.

For the reasons stated, the decree is reversed and the cause remanded, with directions to dismiss the bill of complaint.

82	605
187	225
184	386

82	605
106	166

Chicago & Alton R. R. Co. v. C. G. Pearson, Adm'r.

1. **PLEADING—Waiver of Objections to Declaration.**—Where a party pleads to the counts to which a demurrer has been overruled, he waives his objections to such counts.

2. **SAME—Insufficiency of Declaration—Motion in Arrest of Judgment When Unavailing.**—A motion in arrest of judgment based upon a

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supposed insufficiency of the declaration is unavailing where a demurrer to the declaration has been overruled and pleas filed.

8. **ORDINARY CARE—*In Running Trains.***—A railroad company, in the running of its trains, is always required to use ordinary care and prudence to guard against injury to the person or property of those who may be rightfully traveling upon the public highway, whether there is a statutory regulation upon the subject or not.

4. **SAME—*Persons Bound to Use Ordinary Care to Avoid Danger.***—If by the exercise of ordinary care a person can discover his danger and avoid it, it is his duty to do so, and a neglect of such duty will bar a recovery.

5. **SAME—*Defined.***—Ordinary care is that degree of care which persons of prudence are accustomed to use under the same or similar circumstances.

6. **SAME—*A Question for the Jury.***—Whether or not a deceased person was in the exercise of ordinary care for his own safety, is a question of fact for the jury.

7. **EVIDENCE—*As to Earnings of Deceased Person Proper.***—In an action by an administrator of a person killed by the negligent act of the defendant, evidence as to his earnings, financial condition, age and family, is proper.

8. **DAMAGES—*Where the Court will Not Interfere on the Ground That They are Excessive.***—Where the proofs as to the earnings of the deceased are supplied, and two juries have fixed the same amount, unless the court can see that the verdict is the result of passion and prejudice, or is unreasonable, it will hesitate to interfere on the ground that the amount is excessive.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Livingston County; the Hon. GEORGE W. PATTON, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the December term, 1898. Affirmed. Opinion filed May 19, 1899.

C. C. & L. F. STRAWN and ANTOINETTE FUNK, attorneys for appellant.

A. P. WRIGHT, M. E. WRIGHT and A. C. NORTON, attorneys for appellee.

A motion in arrest of judgment for insufficiency in a declaration is unavailable where the declaration has been demurred to and the demurrer is overruled. *Shreffler v. Nadehoffer*, 133 Ill. 536.

By abandoning a demurrer and pleading to the declaration, a defendant admits its sufficiency and can not after-

ward be heard to assign the decision upon the demurrer as error. C. & A. R. R. Co. v. Pearsons, 71 Ill. App. 622.

MR. JUSTICE CRABTREE delivered the opinion of the court.

Appellee, as administrator of the estate of Ole B. Thompson, deceased, brought this action on the case against appellant to recover damages for the benefit of the next of kin of said deceased, alleged to have been sustained by them in consequence of the death of said Thompson, who was killed by one of appellant's freight trains at a street crossing in the village of Odell, on October 25, 1896. This case was before us on a former appeal, when a judgment for \$5,000 against appellant was reversed, for errors then appearing in the record, as set forth in our opinion, reported in 71 Ill. App. 622. Being remanded to the Circuit Court the case was again tried, appellee obtaining a verdict of the jury for \$5,000, upon which the court entered judgment after overruling motions for a new trial and in arrest of judgment. Appellant again brings the cause to this court and assigns for error that the verdict is not supported by the evidence; that the court erred in overruling the motion for a new trial and in arrest of judgment; that the verdict is contrary to the law, and that the judgment is contrary to the law and the evidence.

Inasmuch as there were fifty-six points in writing urged on the motion for a new trial, and fifty-five points on the motion in arrest, it is impossible, within the limits of an opinion of any reasonable length, that each should be considered and discussed separately, and we shall not undertake that labor. Many of these points we regard as super-technical, but the case being important we have given it the most careful attention and will consider such of its features as are of controlling force in its determination.

The original declaration contained seven counts. A demurrer was sustained to the first, fourth and sixth counts and overruled as to the others. A plea of not guilty was entered as to counts held good, and upon the issues as thus formed the cause was first tried. After the cause was

redocketed in the court below, the plaintiff, by leave of court, filed eight additional counts, but on motion of the defendant to strike out these additional counts, the court required the plaintiff to designate four of them upon which he would proceed, and thereupon the plaintiff designated the first, third, fifth and seventh additional counts as those he would rely on, together with the second, third, fifth and seventh original counts. A demurrer was interposed to these additional counts and sustained as to the seventh, but overruled as to the first, third and fifth, and defendant plead not guilty. The cause was thus tried upon the second, third, fifth and seventh counts of the original declaration and the first, third and fifth additional counts. Without particularly specifying what each count contained, it is sufficient to say that the several counts charged the careless and negligent operation of a locomotive engine and cars attached thereto whereby Thompson was struck and killed; the negligent and careless obstruction of the view of the railroad tracks from either side of the street crossing by railroad cars, locomotives, cabooses, telegraph poles, smoke and steam; the negligent failure to give the statutory signals, and the running of the train at a high and dangerous rate of speed. The several counts contained the usual averments applicable to such charges of negligence. A considerable portion of the argument of counsel for appellee is devoted to the purpose of showing the insufficiency of this declaration. As to that point we can only repeat what we said in our former opinion in this case, that by pleading to the counts to which a demurrer had been overruled, appellant waived its objections thereto. After verdict we must hold that the declaration in this case sufficiently set forth a cause of action. And in this connection we may say, that so far as the motion in arrest of judgment is based upon a supposed insufficiency of the declaration, the point is not well taken, because the rule is that a motion in arrest for such reason is unavailing when the declaration has been demurred to and the demurrer is overruled. *Shreffler v. Nadehoffer*, 133 Ill. 536; *the Quincy Coal Co. v. Hood*, Adm'r, 77 Ill. 68.

The most serious question for our consideration is as to whether the evidence supports the verdict, and this brings us to a discussion of the facts in the case.

Appellant owns and operates a railroad, running northerly and southerly through the village of Odell, consisting of two main tracks and a side track, the latter being some eight feet easterly from the east main track. All of said tracks cross Hamilton street, the principal street in Odell, which is an incorporated village containing a population of about 1,000. The street and railroad tracks were nearly at right angles with each other. It appears that this street crossing was the one most generally used by the people of Odell, and it was here, while attempting to cross the tracks, that Thompson was killed. Southwesterly from this street, and distant therefrom some three car lengths, was the station building, located on the west side of the tracks. Some fourteen or fifteen feet north of Hamilton street was Vincent's grain office, twenty-six feet long north and south; and twenty-nine feet northerly therefrom was Vincent's grain warehouse, which with its wings extended about 100 feet along the track and being some six or seven feet from the side track. These are some of the buildings which it is claimed obstructed the view of the tracks. A part of the roadway over the tracks on Hamilton street was planked, the planking being about twenty-four feet long and extending to about twenty-six feet from the south line of Hamilton street and being continuous from the crossing to the passenger depot.

On the day that Thompson was killed quite a number of box cars stood upon the side track, extending south from the Vincent warehouse to Hamilton street, one of such cars standing partially over the sidewalk or footway on the north side of the street. South of Hamilton street other box cars occupied the side track, extending southerly from about the south line of the street, so that there was not much more than thirty feet of open space at the crossing of the street between the cars.

This is no doubt a sufficient statement of the situation

and surroundings of the crossing on Hamilton street to a fair understanding of the circumstances under which deceased came to his death.

It appears from the evidence that about twelve o'clock of that day Thompson had purchased a ticket over appellant's railroad to Pontiac and return, but the way freight upon which he was to ride being several hours late, he did not leave Odell at the expected time, but remained in the village waiting for his train. The hour of his death does not appear with certainty, but about fifteen minutes before the accident he was at the office of C. W. Carpenter, a justice of the peace, to whom he stated that he was going to Pontiac. Carpenter and deceased left the office together, the former going to the postoffice. Where Thompson went, or where he was from that time to the moment that he arrived at the crossing, does not appear, but when he reached the side track at the crossing, a through freight was going north on the west main track at a rate of speed concerning which there is a serious conflict in the testimony. Other persons were standing at the crossing waiting to pass over when the train should go by, and as the caboose or way car of the north-bound train cleared the crossing, Thompson stepped upon the easterly or south-bound main track, and at that instant a south-bound freight train came along and struck him with such force that he was thrown upward some ten feet and propelled forward a distance estimated by the witnesses at from forty to seventy feet, striking the ground at that distance southerly from the crossing, and thereby causing his death. There is a conflict in the testimony as to the rate of speed at which this south-bound train was running at the time it struck and killed deceased, some of the witnesses putting it at twenty-five, thirty and thirty-five miles per hour, while the trainmen in charge of the train place the speed at not more than eight to ten miles per hour.

It is contended that the testimony of the witnesses who swear to the high rate of speed is not reliable, because they only "guess" at the rate, while the trainmen, from their

occupation and daily familiarity with the speed of trains, are much more liable to be correct in their estimates. As a general proposition this may be so, but two juries have passed upon this case upon substantially the same evidence, and must have found the facts as to the rate of speed against appellant. There is a physical fact in the case which **naturally** had its weight with the jury, and that is that when Thompson was struck he was thrown into the air and propelled a distance of nearly or quite sixty feet, from the crossing. Jurors, in common with all others who are at all observing, will not readily believe a man can be struck by an engine and thrown sixty feet through the air when the train is moving at a speed of only eight or ten miles per hour. We think from all the evidence, and facts appearing in the evidence, the jury were warranted in believing that the train was running at a high rate of speed. But it is argued that there is no law in this State limiting the rate of speed at which a railroad company may run its trains, in the absence of municipal regulations, and that therefore no negligence can be imputed to appellant from the mere fact, if it be a fact, that the train in question was run at a high rate of speed. Counsel for appellant is undoubtedly correct in this contention, and we so held when this case was formerly before us, but this rule of law must always be understood with this limitation, that a railroad company, in the running of its trains, is always required to use ordinary care and prudence to guard against injury to the person or property of those who may be rightfully traveling upon the public highways, and this is so whether there is a statutory regulation upon the subject or not. (C., B. & Q. R. R. Co. v. Perkins, 125 Ill. 127.) There can be no question that at street crossings, in a populous city or village, where the public have a right to be, and where people are constantly passing and repassing, railroad companies should exercise a degree of dilligence commensurate with the danger, whether so provided by statute or not. It is a matter of common sense that greater care should be used in a crowded city or village, than in the rural districts, hence what may be a safe

and reasonable rate of speed in one locality may not be in another. Human life is too sacred to be exposed to unnecessary dangers, and while the running of trains through populous communities is one of the necessities of the present condition of commerce, those operating them must have due regard to the rights of others and the dangers of their operation. This is a duty, the neglect of which is actionable negligence. It is insisted, however, that deceased was so regardless of his own safety in stepping upon the track in front of a moving train, and therein guilty of such negligence that no recovery can be had. It is true and well settled law that if by the exercise of ordinary care deceased could have discovered the danger and avoided it, it was his duty to do so, and a neglect of such duty would bar a recovery. Whether or not the deceased was in the exercise of ordinary care for his own safety was a question of fact for the jury. Two juries have passed upon the same question and determined it against appellant; on the last trial it was found by the jury upon a special interrogatory propounded to them on that point. After a careful and laborious examination of the evidence, we do not feel justified in saying the jury were wrong. It is true others stood at the crossing with deceased, with perhaps no better opportunities of observing than he had, and yet saw the danger and avoided it. It does not necessarily follow he was guilty of negligence. The natural instinct of self-preservation is so strong it is not to be presumed deceased recklessly exposed his life to danger. Waiting at the crossing for the north-bound train to pass, it was not an unnatural thing for him to make a start as soon as the last car of that train cleared the roadway. No sooner had he stepped upon the track than the south-bound train struck him. There is no evidence he had seen it coming or heard its approach. Others had, and when he was seen to start they called out to warn him, but it was too late. There is nothing to show he heard the warning and refused to give heed thereto. The noise and confusion of the two trains was such that he may well not have heard. There was smoke and steam in the air, which to some

extent may have obscured the vision. At any rate he was caught and killed. There is the usual conflict in the evidence as to whether the statutory signals were given by ringing a bell or blowing a whistle. Whatever the fact may be, and it was for the jury to say, in the confusion arising before the passing of the two trains, even if the south-bound train gave the proper signals, deceased may have supposed them to come from the north-bound train without being guilty of negligence in so supposing. Under all the circumstances we are not prepared to hold that the want of due care on the part of deceased so clearly appears that we ought to reverse the case on that ground, when two juries have found the same way. A motion was made by defendant below to strike out all evidence as to the north-bound train, and also as to the existence of smoke and steam in the air at the time of the collision, but such motions were overruled, and it is claimed this was error. We think the ruling of the court was right, and that the evidence was proper to be considered by the jury regardless of the question as to whether these matters were alleged in the declaration. Upon the question of due care on the part of deceased, it was eminently proper that the jury should be apprised of all the circumstances by which he was surrounded at the time he was struck, so that they might put themselves in his place, and by their knowledge of what ordinarily prudent men would be expected to do under like circumstances, be enabled to judge intelligently as to his conduct. It was also proper, as bearing upon the question as to whether appellant was negligent in running its trains under all the circumstances then appearing.

It is contended that the court improperly allowed evidence as to the earnings of deceased. This evidence showed that he earned from \$1.25 to \$5 per day, according to the kind of work he was engaged in. He was a man of small means, earning a living mostly by his daily labor. Sometimes he worked for others by the day, and occasionally he took jobs of laying tile, at which he sometimes made as high as \$5 per day. He was about forty-two or forty-three

years old at the time of his death, and had a wife and six children depending upon him for support. Another child was born after his death. We think the evidence was proper. *C. & N. W. Ry. Co. v. Moranda*, 93 Ill. 302.

On cross-examination of appellee, he was asked by counsel for appellant whether deceased was a drinking man, and the court sustained an objection thereto. As this was not proper cross-examination the ruling was right. Nor was there any reversible error in allowing proof that there was a horse fair in Odell on the day of the accident. We can not see how it could possibly have harmed appellant in any view of the case. Other objections to the rulings of the court upon the evidence are not well taken.

There was no error in allowing an amendment to the declaration alleging the existence of smoke and steam. As we have already seen, the evidence as to smoke and steam was competent, whether in the declaration or not, and amending the declaration so as to allege it could do no harm. It is insisted that the damages are excessive, and the case of *I. C. R. R. Co. v. Weldon*, 52 Ill. 290, is cited in support of this contention. We do not regard that case as being of controlling force in this.

There was no proof in that case of the earnings of Weldon, the deceased. Here the proofs are supplied, and we are not prepared to say the damages are excessive, in view of the evidence as to the earnings of deceased, the size of the family dependent upon him, and the fact that two juries have fixed the same amount. It is for the jury to assess the damages, and unless the court of review can see that the verdict is the result of passion and prejudice, or is unreasonable, it will hesitate to interfere on the ground that the amount fixed is excessive.

There was no error in refusing to exclude the evidence and direct a verdict for the defendant. There was certainly evidence sufficient to go to the jury upon the questions of fact so that the court would not have been warranted in withdrawing it from their consideration.

We are of the opinion there was no error on the part of

the court in its action on the special findings which appellant desired submitted to the jury. Counsel for appellant concedes it was not error to refuse the first and third special interrogatories but insists it was error to refuse the second and fourth.

The second was as follows:

“Was what Thompson did, if anything, to ascertain if a train was approaching, what an ordinarily and reasonably prudent man would have done under the same circumstances?”

The fourth was as follows:

“Would an ordinarily and reasonably prudent man, under the circumstances existing at the crossing, have stepped upon the track without first looking to see if the train was approaching?”

In place of these interrogatories which the court refused to submit, the court, of its own motion, prepared and submitted the following:

“Was Ole B. Thompson, in view of the physical surroundings at the time of the injury, then in the exercise of ordinary care for his own safety?”

Under the authority of *C. & N. W. Ry. Co. v. Dunleavy*, 129 Ill. 132, we think the action of the court was proper. The reasoning and principles of that case are applicable to the case at bar and need not be here repeated. The ultimate fact which was in issue, was submitted to the jury, and that is all appellant was entitled to.

Complaint is made of the first instruction given on behalf of appellee, which is as follows:

“You are instructed that the law did not require of the deceased the exercise of an extraordinary degree of care. All that was required of him was the exercise of ordinary care, and what is ordinary care depends upon the circumstances of each particular case, and is such care as a person of ordinary prudence and intelligence would usually exercise under the same or similar circumstances.”

The objection is as to the words “intelligence” and “usually.” We are of the opinion the instruction is not erroneous on account of those words being contained therein.

It is difficult to understand how a person can exercise ordinary care, without being possessed of ordinary intelligence. Those who are *non compos* are not expected to exercise care or discretion, but in those who possess ordinary intelligence, we look for a use of their faculties in avoiding danger. We can not agree with counsel for appellant that intelligence has nothing to do with prudence.

As to the word "usually," it is not uncommon to find words of similar import in definitions of ordinary care. For instance, in Note 1 to Sec. 31 of Shearman and Redfield on Negligence, it is said :

"Ordinary care has been defined with special reference to the doctrine of contributory negligence, as 'that degree of care which persons of ordinary care and prudence are accustomed to use and employ, under the same or similar circumstances.'" Citing *Cleveland, etc., R. Co. v. Terry*, 8 Ohio St. 570-581.

Here the word "accustomed" is used in a sense synonymous with the word "usually."

The only way we can judge as to what ordinarily prudent men will be likely to do under a given state of circumstances, is by observing what such men usually do under the same or similar conditions. Without prolonging the argument we hold the instruction was not erroneous. The objections to the giving or refusing other instructions are not well taken. The jury were very fully instructed on every branch of the case; appellant had all the benefit in that respect that it was entitled to, and we think has no just cause of complaint on that score.

Finding no material error in the record, the judgment must be affirmed.

City of Aurora v. John H. Scott.

1. ADMISSIONS—*Opinions of Witnesses in Affidavits for Continuances.*—A party in admitting an affidavit to avoid a continuance, under section 25 of the practice act, does not admit the alleged opinions of the witness contained in it where the opinions would not be competent if

City of Aurora v. Scott.

the witness were present. Such opinions are incompetent and properly excluded.

2. **WITNESSES—How Interest May Be Shown.**—When interest disqualified a witness, proof of such interest was not confined to his cross-examination, and although our statute (R. S., Chap. 51, Sec. 1) has removed the disqualification, interest may still be shown to affect the witness' credibility, and by the same kinds of evidence, admissible to prove the fact when it resulted in his disqualification.

3. **EVIDENCE—City Contracts, in Actions for Personal Injuries.**—In an action against a city for injuries caused by an open ditch left by a contractor in a street in which sewers were being constructed, the contract under which the work was being done, and which contained a provision by which the contractors agreed to save the city harmless from all damages to person or property because of injuries received on account of such work, is competent as tending to show the city and its officers knew how the trenches ought to be filled, and to charge them with knowledge of the proper way to protect the public by filling such trenches, and as also tending to show that they were negligent in permitting the trenches to be filled without observing these precautions, and in opening the street to public travel while in such condition.

Action in Case, for personal injuries. Trial in the Circuit Court of Kane County; the Hon. CHARLES A. BISHOP, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the December term, 1898. Affirmed. Opinion filed May 19, 1899.

W. J. TYERS, and ALSCHULER & MURPHY, attorneys for appellant.

HANCHETT & PLAIN, HOPKINS, THATCHER & DOLPH, and R. B. SCOTT, attorneys for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

While John H. Scott was riding along Galena street, in the city of Aurora, upon a light wagon, on the evening of October 6, 1896, he was violently thrown to the street and injured. He sued the city to recover damages therefor, claiming his injuries were caused by the defective condition of the street and that the city was negligent in permitting it to be in that condition. The city in defense denied that it was negligent, and asserted that the injuries were attributable to plaintiff's lack of ordinary care for his own safety and to his contributory negligence. Upon a jury trial

plaintiff had a verdict and a judgment for \$2,500, from which the city prosecutes this appeal. Defendant fractured his hip, is made lame for the rest of his life, suffered great pain for a long time, and received injuries to other parts of his body, and it is not claimed the verdict was excessive if he was entitled to recover.

Scott had lived at Kaneville, thirteen miles northwest of Aurora, many years. He was moving into Aurora. Galena street is the usual traveled road from Aurora to the west, and the one which Scott had almost invariably traveled in going between Kaneville and Aurora. In the fall of 1896, the city dug a sewer lengthwise along Galena street for several blocks. This sewer was south of the center of the street. Then it dug lateral ditches from the lot lines to the vicinity of the sewer. Those on the north side of the sewer came from the northwest, crossing the street diagonally. Each lateral ditch stopped about two feet from the sewer, and a tunnel was dug from that point to the sewer underneath the surface of the ground sufficiently large to enable a workman to connect the lateral pipe with the main sewer. The lateral ditches were then filled by scraping the dirt into them by the use of a machine drawn by a team of horses. The dirt so scraped in was heaped up, but was not tamped nor made solid, and the tunnels next to the sewer were not filled at all. This work was done for the city by Tole & Larkin, contractors. Just after the work was finished there was a heavy rainfall, and the earth settled rapidly, and its settling frequently left open holes in this street. When these were discovered from time to time the city soon thereafter caused the holes to be filled.

On September 28, 1896, Scott, being in Aurora, wished to go to his farm for a load of goods, and went to the place where he should enter upon Galena street and finding it open drove west upon it, and found it much torn up, and found it barricaded at the west end of the sewer. When he returned from the country with a load that night he did not enter by that part of Galena street, but passed north to Plum street, with which he was unfamiliar, and found it not

lighted or graded, but very muddy, and had difficulty in getting through, and had to take off part of his load. On October 6, he again started from Aurora to go to Kaneville after a load of goods. He designed to seek some other street than Galena to go out upon, but met a man from Kaneville who had just come in with a load who told him he had just come over Galena street and that it was bad but he could get through. The barriers had in fact been removed and the street opened to public travel. Scott then went over that street and found it rough and uneven by reason of the ridges and depressions over the lateral ditches. There was but one traveled track, and it was north of the sewer. He had a light wagon, drawn by one horse. The wagon was an ordinary three-spring wagon, the two rear springs running lengthwise of the wagon and the front spring crosswise. At Kaneville, Scott placed in the left-hand side of the wagon an upright book-case, and upon the right-hand side another book-case resting on its side. There were carpets and hay under and around the cases. These cases were properly tied to the wagon. There was a space of twenty-one inches between the cases which was filled with hay, etc. In front of the book-cases Scott placed a two-bushel basket filled with books. Other baskets of books and some fire wood were in the rear part of the wagon. The book-case, which rested upon its side, came thirty-eight inches above the bottom of the wagon box, and twenty-six inches higher than the regular wagon seat. Upon the front end of that case he put a cushion and upon that took his seat, with his body slightly turned toward the center of the wagon and his feet in the basket upon the books. Riding in that fashion he drove in safety to Aurora, and traveled for some miles upon a road newly graveled, with the gravel heaped up in the center, and crossed it from one side to the other several times without difficulty or harm to himself or his load. When he came to Aurora after dark he drove in on Galena street as usual. It was the only street with which he was familiar in that part of the city. It was being generally traveled that day. He had tried a street

north the week before with unsatisfactory results. The street next south of Galena street was occupied by a street car line, and Scott's horse was afraid of the street cars. He drove his horse at a slow walk along the one traveled track north of the sewer. The way was rough on account of the lateral ditches, which had been filled more than full and in some places had settled. They were angling to the northwest, so that the wheels on opposite sides of the wagon did not strike the elevations or depressions at the same time. Aside from this inconvenience no danger was apparent to him. We think the jury were justified in finding from the evidence that at the place where the accident happened the right fore wheel went into a hole ten or twelve inches deep in one of these lateral ditches or tunnels, and that corner of the wagon went down suddenly just as the rear wheel passed over an elevation equally high, and that plaintiff was thereby thrown from his seat to the ground and injured as before stated.

We have considered the evidence and conclude the jury was justified in finding the city was negligent in leaving its laterals and the tunnels in the condition we have described after it removed the barriers and opened the street to public travel. We can not say plaintiff was guilty of contributory negligence in driving upon that street at that time. It was his natural way from Kaneville to his new home. By removing the barriers the city invited public travel. Scott knew there had been barriers and knew they had been removed. He had passed along that street safely that morning. We think it a close question whether Scott was exercising due care in sitting upon the book-case in the position we have described while riding along this uneven street. But he had ridden safely in that way nearly thirteen miles and over the newly graveled road spoken of, and over part of this same sewered street. There is nothing to show he knew or had any reason to know the earth had not been tamped nor the tunnels filled, nor, indeed, that any such tunnels had been dug under the surface of the street, and therefore there is nothing to show that due care

should have made him expect the existence of such holes as that which caused him to be thrown from the wagon. He traveled in the same general track many other teams had done that day. It may be he would not have been thrown off if he had been riding upon a wagon seat in its usual position; but many people find it necessary to drive upon streets upon the top of loads, and people with loads have a right to use the streets, and his experience that evening shows it was entirely safe for him to ride upon any ordinary street. We are unable to say the jury ought to have found that his riding upon that street at that time in that position upon the top of the book-case was a want of due care, or that another jury would so find.

Before the trial began defendant moved for a continuance on account of the absence of two witnesses, C. C. Lakin, one of the contractors who built the sewer, and Lee Lowry. The court ordered the case continued unless plaintiff would admit the witnesses, if present, would testify as stated in the affidavits for a continuance. Plaintiff made the admission, and the motion was denied. Defendant claims the continuance should have been granted. The suit was begun in November, 1897. The motion to continue was in May, 1898. The affidavits for the continuance showed that Lakin was in Rockford, and had for several months been engaged there in the important work on account of which it was claimed he could not then be spared to come to Kane county as a witness. The city had long been advised that he claimed he could not then attend the trial. It did not cause him to be subpoenaed. It is obvious it is not true that it was impossible for him to come to the trial. The work upon which he was engaged was being prosecuted for twenty-four hours every day and seven days every week. He certainly slept a part of the time, and when he did so, some one else attended to his important duties. No protracted absence would have been necessary. The city did not take his deposition. By the ruling of the court the city had the advantage of his evidence as fully as it saw fit to embody it in the affidavits. Section 25 of the practice act

does not entitle a party to a continuance if the affidavit is admitted by the opposite party. It is claimed defendant needed Lakin to help to prepare for the trial. It could consult him at Rockford, and did so; and we do not think a sufficient showing on that ground was made to require a continuance. This case may have been as important to Scott as Lakin's services at Rockford were to his employers there. It afterward appeared that Lakin was bound by his contract to protect the city of Aurora against this suit. If he was really a party in interest, and wished to protect his own interest, he knew of this suit long before and should not have entered into a contract at Rockford which would interfere with his presence at this trial. By the admission of the affidavits defendant had the benefit of Lowry's evidence, and no reasonable grounds were shown by the affidavit for believing his presence or deposition could not be procured by the next term. We think defendant has no just ground to complain of the ruling upon the motion to continue. When defendant afterward offered the affidavit of Lakin at the trial the court, upon objections by the plaintiff, excluded those portions of the affidavit wherein Lakin stated that the street was "safe for public travel," and was not "left unguarded in an unreasonably unsafe condition," etc. The statute only authorizes so much of the affidavit to be read to the jury as states that which the witness, if present, would, under the rules of evidence, be permitted to state upon the witness stand. (*Slate v. Eisenmeyer*, 94 Ill. 96; *Chicago City Railway Co. v. Duffin*, 126 Ill. 100.) This was not a case for the opinion of experts as to whether the street was safe or unsafe, nor whether it was "not left unguarded in an unreasonably unsafe condition." The witness should have described the street, whether it was level or otherwise; whether there were ridges, holes, tunnels, etc., and their height, depth, etc., and it would have been for the jury to say whether it was safe or unsafe in the condition described. We think the opinions of the witness were incompetent and were properly excluded.

In rebuttal plaintiff offered a part of the contract between

the city and Tole and Lakin for the building of said sewer, which shows that Tole and Lakin had agreed to save the city "from all damages to person or property because of injuries received by the work which the contractor is doing," and to defend the city against any suit for any such injuries, and to pay any judgment rendered against the city in any such suit. The affidavit as to Lakin's testimony had been read in evidence, and this was offered to discredit him by showing his interest in the event of the suit. The offer was expressly limited to that purpose. The objection urged is that such evidence was not competent till the witness had been cross-examined upon the subject and denied his interest, and that when the plaintiff agreed to admit the affidavit to avoid a continuance he waived the right to cross-examine, and therefore put himself in a position where he could not impeach or discredit the witness. It is true statements by the witness, either oral or in writing, contradictory to his evidence, can not in such cases be shown, because the foundation therefor can only be laid by a cross-examination. *C. & A. R. R. Co. v. Lammert*, 19 Ill. App. 135; *North Chicago Street Railway Co. v. Cottingham*, 44 Ill. App. 46; *In re Noble*, 124 Ill. 266.

If Lakin had been present and had been cross-examined upon the subject of his interest, while he could have been asked whether he had entered into a contract with the city, yet a question calling for the contents of the writing would have been objectionable, and if an objection had been interposed that the writing furnished the best evidence of its provisions that objection must have been sustained. Notwithstanding the presence of the witness, the objection would have driven plaintiff to prove Lakin's interest by the contract itself. Therefore a cross-examination of said witness was not necessary in order to show his interest. When interest disqualified a witness, proof thereof was not confined to cross-examination. (1 *Greenleaf on Evidence*, Sec. 423.) Though our statute (*R. S.*, Chap. 51, Sec. 1,) has removed the disqualification, it still permits interest to be shown to affect credibility. No reason is perceived why the

interest of the witness may not still be shown by the same kinds of evidence admissible to prove the fact when it resulted in disqualification.

In his case in chief, plaintiff was permitted, over defendant's objection, to read in evidence that part of the contract already referred to, which showed the city required the trenches to be filled with earth and thoroughly compacted by careful ramming and pounding, and required the earth to be deposited in layers not exceeding nine inches in thickness and each of said layers to be well rammed. It is obvious that if this requirement had been observed Scott would not have received this injury. We think this evidence was competent as tending to show the city and its officers knew how the trenches ought to be filled. It tends to charge them with knowledge of the proper way to protect the public in filling such a trench. It tends to show they were negligent in permitting the trenches to be filled without observing these precautions and in opening the street to public travel while in such condition.

We do not think the instructions given for plaintiff subject to serious criticism. The court very fully instructed the jury for defendant in twenty-six instructions. Finding no substantial error in the record the judgment is affirmed.

82	624
110	578

Andrew Klees v. Chicago & E. I. R. R. Co.

1. APPELLATE COURT PRACTICE—*Certificate of Importance, When to be Applied For.*—A certificate of importance is a condition precedent to the right of appeal from the Appellate Court in cases involving less than \$1,000, and must be procured within the twenty days allowed by section 90 of the practice act for praying appeals.

Motion, for a certificate of importance. Motion denied. Opinion filed June 15, 1899.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

This is an application for a certificate of importance. The action was case, and on a trial in the court below the jury were instructed to return a verdict for the defendant, which was done, judgment rendered thereon, and the plaintiff appealed to this court. Our opinion affirming the judgment of the Circuit Court was filed December 9, 1896, and is reported in 68 Ill. App. 244. No certificate of importance was then applied for, without which it is conceded no appeal could have been taken. The object of the present application is to enable appellant to prosecute a writ of error to the Supreme Court.

If our power or right to grant the certificate were clear, we would have no hesitation in complying with the request, but we are of the opinion that under the law it would be improper for us to do so. In the case of *Kirkwood et al. v. Steele*, 168 Ill. 177, it is held that a certificate of importance, being a condition precedent to the right of appeal from the Appellate Court in cases involving less than \$1,000, must be procured within the twenty days allowed by section 90 of the practice act for praying appeals.

It is true this decision, by its terms, seems to apply only to appeals, but no reason is perceived why a different rule should prevail in cases of writs of error. The idea can hardly be tolerated that in all the cases where no appeal lies without a certificate of importance, the defeated party may wait until the five years allowed for suing out a writ of error have nearly expired, and then come in and apply for such certificates. Hundreds of such cases may have been decided in that time, the *personnel* of the court entirely changed, and yet, if the right to apply for a certificate of importance exists, the court, as at present constituted, would be bound to examine the cases formerly passed upon by other judges, and determine the question whether the certificate should be granted. We think it was not the intention of the legislature to produce any such result; on the contrary, we are of the opinion that the certificate of importance, if awarded at all, should be granted by the judges who heard and decided the case. This court, as now

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constituted, has only one of the judges who was a member of it when this case was decided. One of its present members tried the case in the court below, while the third member of the court had no connection with the case whatever. Under these circumstances, and for the reasons given, we think the certificate of importance must be denied.

Certificate denied.

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e93	632

First National Bank v. Union District Number One.

1. **DRAINAGE—Commissioners to Make Tax Levy Before Proceeding to do Additional Work.**—Under Sec. 41 of the Farm Drainage Act (Hurd's Statutes, 1897, 674), when the commissioners find it necessary to use money to repair work already done, or to more fully protect the lands of the district, they can use such funds as are on hand, but if there are no funds on hand, they must, before proceeding to do such additional work, make a new tax levy to pay for the same.

2. **SAME—Power of Commissioners.**—Drainage commissioners have no power to create an indebtedness in advance and then levy an assessment for the purpose of meeting it.

3. **SAME—Holders of Drainage Orders—When Entitled to Judgment.**—To entitle the holder of drainage orders issued to contractors for work done by them upon certain ditches, it must appear that he has a legal claim against the real estate within the district benefited by the improvement, for it can only be satisfied by special assessment upon such property.

Assumpsit, on drainage orders. Trial in the Circuit Court of Whiteside County; the Hon. FRANK D. RAMSEY, Judge, presiding. Finding and judgment for defendant; appeal by plaintiff. Heard in this court at the December term, 1898. Affirmed. Opinion filed April 11, 1899.

F. E. ANDREWS and A. A. WOLFERSPERGER, attorneys for appellant.

WHITE & SHELDON and C. L. SHELDON, attorneys for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This is an action of assumpsit brought by appellant upon certain drainage orders issued to contractors for work done by them upon certain ditches for appellee, and assigned by such contractors to appellant.

Defendant filed a plea of the general issue and it was stipulated by the parties that the case should be tried on the declaration and general issue, and that the latter should have the effect of such proper special pleas as might have been pleaded. A jury having been waived, the case was tried by the court and judgment entered for appellee and against the appellant for costs. The appellee, drainage district, was organized in July, 1882, under what is known as the "farm drainage act." An assessment was made in 1883 upon the lands in the district for the sum of \$6,622.67 for the construction of certain ditches to drain such lands, and thereupon contracts were let and the ditches constructed. Other assessments were made to complete said ditches and to keep the same in repair in 1884, 1887 and in 1890. In the summer of 1893, it appearing to the commissioners that the ditches were in places partially filled and were not benefiting the lands in the district in the manner designated by the enterprise, another assessment was made for the purpose of clearing the ditches, changing their location in places, and doing other work necessary to drain the lands in the district as originally contemplated. This assessment was made on the fifth day of October, 1893, and was for the sum of \$5,073.75. The report of the engineer in charge of the work, based on his survey made in July, 1893, recommended the clearing out of the ditches, estimated that this work would require the removal of 31,037 cubic yards of earth at a cost of about \$5,000, and the assessment was based upon this estimate. By reason of changes in the plans, and accidents to the work caused by an unusually severe storm, the same was not fully completed until June or July, 1895. The amount of earth removed had increased from the original estimate to about 100,000 cubic yards, and the cost to about \$12,000. After the tax levied by the assessment of October 5, 1893, was exhausted, the commis-

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sioners, having no funds to further prosecute the work, issued interest-bearing orders to the contractors who disposed of the greater part of them to banks in the neighborhood. The orders sued on in this case are some of those so issued and assigned.

The work having been completed, the drainage commissioners on August 31, 1895, levied a further assessment of \$6,531.33 upon the lands in the district to pay the indebtedness already incurred and for which said orders had been issued.

While other questions are raised by the record in this case, the most important and the only one necessary for us to consider is whether the commissioners of the district could legally contract debts and afterward make an assessment upon the lands in the district to pay the same. Appellant contends that the contractors had a right to complete the work commenced by them and to look to the district for pay, notwithstanding the facts that the work done by them was largely in excess of that originally contemplated, and the funds raised by the assessment levied to pay for the same were exhausted; and also that an assessment might afterward be legally made to pay for such work by the proper authorities.

The case of *Ricketts v. The Village of Hyde Park*, 85 Ill. 110, is relied upon to sustain this position. In that case the court held that the corporate authorities of the village could levy an assessment to pay for work already done in good faith, but the court bases the decision upon the fact that the power to make an assessment for such purpose was clearly given by the statute. The farm drainage act contains no such provision. Section 41 of this act is as follows:

“After the completion of the work the commissioners shall thereafter keep the same in repair; and if they find by reason of error in locating or constructing the ditches or any of them, or from other causes, the lands of the district are not drained or protected as contemplated, or some of them receive but partial or no benefit, they shall use the corporate funds of the district to carry out the original purpose, * * * provided in all such cases, if sufficient

funds are not on hand the commissioners shall make a new tax levy." Hurd Statutes 1897, 674.

We think it the evident intention of the above section of said act that where, after the completion of the work, the commissioners find it necessary to use more money to repair the work already done, or to more fully protect the lands of the district, they can use such funds as are on hand for that purpose, but if there are no funds on hand they must, before proceeding to do such additional work, make a new tax levy to pay for the same.

The statute gives the commissioners great power in the matter of the use of their discretion in doing work within the district. The character of the improvement and the manner in which it shall be done is left entirely to them, without consultation with the land owners. The only privilege conferred upon the latter is that of appealing to the County Court in case the tax assessed upon their lands is greater than the amount of benefits to accrue to the same by the proposed work. If the commissioners were given the right to first construct the work and then levy an assessment to pay for the same they might contract debts to an amount far in excess of the benefits derived by the land for such work; and if the land owners in such case should appeal to the County Court, as provided by law, and obtain relief from such assessment, the creditors of the district who did the work would be without remedy, as no assessment could be enforced to satisfy their demands. It is for the benefit alike of the land owners and the creditors of the district, that the assessment shall be first made and the contracts for the work proposed afterward let, to be paid for out of the funds to be raised by such assessment.

Our Supreme Court has directly held that drainage commissioners have no power to create an indebtedness in advance and then levy an assessment for the purpose of meeting it. *Winkelmann v. Drainage District*, 170 Ill. 37; *Ahrens v. Drainage District*, Id. 262.

It is true that the above cause arose under what is known as the "Levee Drainage Act," and it is therefore contended that the rule there laid down does not apply to this case.

In the opinion delivered in the former of the above cases it is said, "We are unable to find any authority in any of the drainage district acts authorizing the levy of an additional assessment for the purpose of paying the outstanding liabilities of the district."

While there is a considerable difference in the two acts, we know of no reason why the principle above enunciated should not also apply to cases arising under the farm drainage act. The assessment in question having been levied to pay an indebtedness created in advance was without authority of law.

To entitle appellants to a judgment in this case it must appear that they have a legal claim, not merely as against the commissioners, but as against the real estate within the district benefited by the improvement, for if judgment be rendered, it can only be satisfied by special assessment upon that property. *Badger et al. v. Inlet Drainage District*, 141 Ill. 540.

As the special assessment made by the commissioners to pay these orders was illegal, for the reason that the work was done and debt contracted before the assessment was levied, it follows that appellant has no legal claim as against the real estate in the district and therefore is not entitled to a judgment in this case. The judgment of the court below must therefore be affirmed.

**Isabella B. Roberts v. Ella Broughton Woods, May
Broughton and Ben Broughton et al.**

1. APPELLATE COURT JURISDICTION—*Where a Freehold is Involved.*—A bill to set aside a conveyance involves a freehold, and although the Appellate Court has no jurisdiction to review the action of the court in refusing to set aside such conveyance, it has the right to inquire into the *bona fides* of the transaction, as far as it involves the question of the validity of notes forming a part of the purchase, where their validity, as well as the validity of the conveyance, are questions so intimately

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connected with each other, that separate relief as to either can not well be granted.

2. **EXPERT TESTIMONY—Unreliableness as to Signatures.**—The genuine signatures of the same person vary greatly, according to the circumstances and conditions under which they are written, and experts on handwriting can always point out differences upon which to base an opinion as to their genuineness.

3. **CRIMINAL OFFENSES—Proof of, When Involved in Civil Cases.**—Where a criminal offense is charged in the pleadings of a civil case, it is not necessary to prove the charge beyond a reasonable doubt.

4. **PRESUMPTIONS—Possession of Notes.**—Where notes are in the possession of a wife at the death of the husband, and the proofs do not show that they belonged to his estate, the presumption is that they belong to her.

Bill to set Aside a Conveyance, and other relief. Trial in the Circuit Court of DeKalb County; the Hon. GEORGE W. BROWN, Judge, presiding. Decree for complainant; appeal by defendant. Heard in this court at the December term, 1898. Affirmed in part, reversed in part, and remanded with directions. Opinion filed May 19, 1899.

JONES & ROGERS and CHARLES WHEATON, attorneys for appellant, contended that where a criminal offense is charged in the pleadings in a civil suit, such offense must be proved beyond a reasonable doubt, and cited *Harbison v. Shook*, 41 Ill. 147; *Sprague v. Dodge et al.*, 48 Ill. 142; *Germania Fire Ins. Co. v. Klewer*, 129 Ill. 612; *Riggs v. Powell*, 142 Ill. 459; *Grimes v. Hilliary*, 150 Ill. 141.

The value of expert testimony as to handwriting is but slight. It is not of a very high order. *Cowan v. Beal*, 1 McArthur (D. C.), 270; *Borland v. Walrath*, 33 Iowa, 130; *Whittaker v. Parker*, 42 Iowa, 585.

CARNES & DUNTON and A. G. KENNEDY, attorneys for appellees.

It is not necessary in a civil case to prove a criminal offense charged in the pleadings beyond a reasonable doubt. There is a conflict of authority on that question. *Germania Fire Insurance Co. v. Klewer*, 129 Ill., on page 612.

Grimes v. Hilliary, 150 Ill. 141, contains the last expression of our Supreme Court on this question. The court said, on page 146:

"It has been held that where, under the pleadings, it becomes necessary to the maintenance of the plaintiff's cause of action or the defendant's defense to show that the opposite party has been guilty of a criminal offense, such offense must be proved beyond a reasonable doubt. (*Germania Ins. Co. v. Klewer*, 129 Ill. 612; *McConnel v. Mutual Ins. Co.*, 18 Id. 228; *Crandall v. Dawson*, 1 Gilm. 556; *Sprague v. Dodge*, 48 Ill. 142.) If this rule is to be adhered to, in respect of which we express no opinion, the case at bar is clearly distinguishable from the cases cited. It does not follow that because an element may have entered into the act which would have rendered it indictable as a crime, but which is not alleged or necessary to be proved to authorize a recovery in the civil action, the proof must be made beyond a reasonable doubt." *Riggs v. Powell*, 142 Ill. 453, and cases *supra*.

At most the complainants were only compelled to support their charge of forgery by a clear preponderance of proof. *Riggs' Exr. v. Powell*, 142 Ill. 453.

While forgery is charged in the amended bill there are other charges in the bill as amended under which appellant might be held to account for the certificates in question without involving criminality of appellant, therefore the case may be said to fall within the rule that clear proof would be required, not proof beyond a reasonable doubt. *Sprague v. Dodge et al.*, 48 Ill. 142; *Shephard v. Royce*, 71 Ill. App. 321.

Even on the question of proving the allegation of forgery in the amended bill, "clear and convincing proof only is necessary." *Oliver et al. v. Oliver*, 110 Ill. 119.

MR. JUSTICE CRABTREE delivered the opinion of the court.

Appellees, Ella Broughton Woods, May Broughton and Ben Broughton, are three of the children and heirs at law of Chauncey W. Broughton, deceased, who died May 8, 1893, leaving a last will and testament disposing of a large amount of real and personal estate, and in which he named appellant, his wife, and Ben Broughton, his son, as the executrix and executor thereof. Chauncey W. Broughton was married three times. As issue of the first marriage there was one son, Charles P. Broughton, usually spoken of

in the testimony as Preston Broughton. Appellees were the only surviving issue of the second marriage, deceased being married to appellant when appellees were of tender years, said Chauncey W. Broughton being then fifty-seven years old and appellant under thirty years old. By the third marriage there were two sons, Charles B. Broughton and Chauncey W. Broughton, who were defendants below, and are minors under the age of twenty-one years. By his said will deceased gave to his son Charles P. Broughton the sum of \$1,000, and to his wife (appellant), his children, the three appellees and the two minors, he gave, devised and bequeathed all the remainder of his property and estate, both real and personal; appointed appellant sole guardian of his minor children, and directed that the real estate should remain undivided and as a home for the six legatees and devisees, naming them as above stated. This will was duly admitted to probate in DeKalb county, and appellant, together with appellee Ben Broughton, were duly qualified as executors. Certain notes belonging to the estate were divided up among the legatees, but as there is no controversy concerning them they need not be further considered. They amounted to something like \$85,000. Certain of the notes being considered of doubtful value, were retained by appellant, with the understanding that she would account for them when collected. Appellant seems to have had the principal care and management of the estate, her co-executor, Ben Broughton, appearing to have had little to say or do about its settlement.

The real estate consisted of about 832 acres of farm lands, and constituted the farm on which deceased resided with his family at the time of his death, appellant, appellees, and the two minor children being such family. For about one year after testator's death, these parties continued to reside together on the farm, which remained undivided and was worked and carried on in common for the supposed benefit of each and all of them. On August 1, 1884, appellees entered into an agreement, with appellant acting for herself and her wards, Charles B. and Chauncey W. Broughton,

whereby appellant agreed to waive the award of \$1,846, set off to her by the appraisers, and to purchase the interest of appellees in the real estate at a price to be fixed by J. D. Roberts and J. H. Lewis as arbitrators; and appellees agreed to allow on the purchase price certain notes which appellant claimed she held against the estate; the balance of the purchase money to be paid in cash. Appellees agreed to sell at the price to be fixed by the arbitrators, and it was further agreed that this arrangement was to be a final settlement of all notes that appellant held against the estate. This agreement was in writing, signed by appellees, and also by appellant as guardian for the minors. In pursuance of this agreement the arbitrators came together and fixed the price of the land at \$47,000, one-half of which belonged to appellees. On the settlement appellant produced notes which she claimed to hold against the estate, which, with the interest added, amounted to \$17,000, one-half of which was allowed in payment of one-half the purchase price of the land to be paid to appellees.

Among the securities which had been owned by Chauncey W. Broughton in his lifetime, were four certificates of deposit issued by the DeKalb National Bank for \$2,000 each, aggregating the sum of \$8,000; six certificates of deposit issued by the Waterman Bank of Illinois aggregating \$6,680; and fourteen certificates of deposit issued by the Barb City Bank of DeKalb, aggregating \$19,500; being in all the sum of \$34,180 in certificates of deposit of cash in these several banks. Claiming that all these certificates, and the moneys represented thereby had been given to her by her husband, Chauncey W. Broughton, in his lifetime, appellant collected the same and converted the proceeds to her own use, refusing to account therefor in any way to the estate or to appellees.

The bill in this case was filed by appellees against appellant and John D. Roberts (with whom she has since intermarried), as well as against the minors Charles B. and Chauncey W. Broughton, for the purpose of attacking the *bona fides* of said land transaction and the notes allowed in

payment, and also seeking to compel appellant to account for the proceeds of said certificates of deposit; it being alleged that the assignments thereof under which she claimed title thereto were forgeries. As to the land transaction it is alleged that by collusion between appellant and said Roberts, appellees were deceived and defrauded. That said Roberts, although selected as an arbitrator by appellees, and professing to be their friend and to be acting in their interest, was in fact in secret collusion with appellant, whom he afterward married, to cheat and defraud appellees. That the price fixed on the land was low and inadequate, and not a fair price, and that the land was in fact worth more by ten dollars per acre than the price fixed by the arbitrators and paid by appellant. That appellees were deceived by appellant as to the amount of the notes she claimed to hold against the estate, which it is claimed she had represented to be some five or ten thousand dollars instead of the \$17,700 which she afterward produced. That while some of the notes may at one time have been valid, they had been paid by their father before his death and were supposed by him to have been destroyed, and they aver they would never have allowed them in settlement had it not been for the advice of Roberts, whom they supposed then to be acting in their interests.

The bill also attacks the conveyance of a certain eighty acre tract of land made by testator in his lifetime to appellant, and since sold by her for her own benefit, alleging that the conveyance to her was brought about by representations and promises that if the same were made to her she would treat the property as a part of the estate on final distribution and settlement; and that in consequence of such representations, and of the undue influence of appellant over deceased and exercised by her, such conveyance was not the voluntary act of the deceased and was void. There were also charges in the bill in regard to property on the farm on March 1, 1895, which it was alleged appellee and Roberts refused to account for, but as that matter has been all settled and adjusted, and is not involved in this appeal, the details thereof need not be further discussed.

Complainants below (appellees here) offered by their bill to surrender the compensation received by them for their deeds to appellant for the land conveyed to her, prayed that the deeds be declared void, that an accounting might be had, and for further relief. Appellant and Roberts filed their joint and several answer denying all the material allegations of the bill which charged them with fraud or conspiracy, or with any wrongful conduct whatever in their dealings with appellees concerning the settlement of said estate or the assets thereof, or said land transaction and the arbitration proceedings, or any other wrongs with which they were charged by the bill. Avers that the land sale was fair and *bona fide*; that \$45 per acre was a fair value for the land; that the notes held by appellee against Chauncey W. Broughton were valid and just claims against his estate and could have been collected as such. Further avers that appellees at the time were satisfied with the result of the arbitration, and ratified the same by executing their respective deeds for their several interests in the land. That appellees had full knowledge of the notes at the time of the arbitration, the articles of which expressly provided that one-half the amount thereof should be deducted from the amount going to complainants. Appellant denies that she represented that such notes would only amount to \$5,000 to \$10,000. Appellant avers that deceased in his lifetime gave, assigned and delivered to her the certificates of deposits in the several banks in DeKalb county, which have been hereinabove referred to, whereby they became and were her separate property, and that complainants and the estate of the deceased had no interest in them. Further avers that at the time of his death she owned and held notes against said C. W. Broughton amounting to about \$17,000, a copy of which notes she attached to her answer.

We have omitted to state in the proper place that by an amendment to the original bill complainants set out specifically the items as to the bank certificates of deposits, and distinctly charged that appellant, at some time unknown to complainants, forged the name of their father, Chauncey W.

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Broughton, on the back of each of said certificates of the Waterman and DeKalb National Banks, and after the death of said Chauncey W. Broughton wrongfully withdrew from said banks the money so deposited and evidenced by said certificates, and converted the same to her own use and refused to account therefor to the complainants. It is further charged in the amendment that at the time of the death of said Chauncey W. Broughton there was deposited in the Barb City Bank at DeKalb, Illinois, in his name, and of his moneys, \$19,500, evidenced by fourteen certificates issued by said bank therefor, and that without the knowledge or consent of said Chauncey W. Broughton, said certificates were by the cashier of said bank interlined so as to make them payable either to Chauncey W. Broughton or Belle B. Broughton, and that after the death of said Chauncey W. Broughton said Belle B. Broughton wrongfully collected the moneys due on said certificates and converted the same to her own use and refuses to account to the complainants therefor, or any part thereof. And it is further charged that appellant forged the name of Chauncey W. Broughton to two certain paper writings purporting to transfer said certificates of deposit from Chauncey W. Broughton to herself, and appearing to be witnessed by E. P. Orr and Henry H. Wann.

Appellant denied all and every of the allegations charging her with fraud and forgery, and avers that Chauncey W. Broughton signed his own name in his own handwriting in the presence of E. P. Orr and Henry H. Wann, and that they signed their own names as witnesses to said papers in the presence of said C. W. Broughton, and at his request, and that the signature of said C. W. Broughton to the said two paper writings are his genuine signatures, and that the signatures of the indorsement to her of the six certificates of deposit of the Waterman Bank, and the four certificates of the DeKalb National Bank, are each of them genuine signatures of the said C. W. Broughton. Avers that said C. W. Broughton was indebted to her in the full amount of the notes and interest allowed in settlement for

the real estate at the time of his death, and that the same were valid claims against his estate. Avers that the arbitration proceedings were entered into in good faith, and denies all conspiracy or confidential relations between herself and John D. Roberts in relation thereto, and again expressly denies all fraud and forgery charged in the bill and the amendment thereto. The minors answered by guardian *ad litem*, and the cause being at issue was referred to the master in chancery, to take and report proofs and findings. A large amount of testimony was taken by the master and returned into court, but no findings were made by him, and by agreement of both parties the cause was heard by the court upon the testimony taken by the master and also upon evidence produced and offered in open court upon the hearing. As to the matters in contention, the court found by its decree, that the sale of the land by appellees to appellant was a fair and *bona fide* transaction, and at a fair valuation.

2. That the notes allowed in settlement of the land purchase held by appellant against the estate of C. W. Broughton, constituted a valid indebtedness for the amount claimed and allowed.

3. That the arbitration proceedings were fair and valid.

4. That the certificates of deposit upon the Barb City Bank of DeKalb for the sum of \$19,500, were the property of said Isabella B. Roberts.

5. Dismissed the bill for want of equity as to the defendant, John D. Roberts.

6. Decreed that the certificates of deposit of the Waterman Bank for the sum of \$6,680, and the four certificates of deposit upon the DeKalb National Bank, amounting to \$8,000, were the property of the estate and should be accounted for as such, together with the interest thereon, from the 8th day of May, 1893, amounting in the aggregate to the sum of \$18,417.23.

There was a further finding, that of the chattel property on the farm, or the proceeds thereof, there was due and owing from appellant to appellees, the sum of \$2,819.68, to

which finding there was no exception, and appellant having paid appellees that amount, no further attention need be paid to this part of the decree.

It was further decreed that appellant pay the costs of the suit, and from so much of the decree as charged her with the amount of the Waterman Bank and the DeKalb National Bank certificates of deposit, appellant prayed an appeal to this court.

From those portions of the decree which found against them, appellees prayed an appeal to the Supreme Court, but it is said in the briefs of counsel that such appeal was never perfected.

The errors assigned by appellant, are that the court erred in finding that the certificate of deposit issued by the Waterman Bank and the DeKalb National Bank, amounting in the aggregate to the sum of \$14,680, were the property of Chauncey W. Broughton at the time of his death, and decreeing that appellant should account for the same to his estate, and also in decreeing that she should pay the entire costs of the suit.

Appellees assign cross-errors as to the action of the court in decreeing against them and in favor of appellant as to the certificates of deposit issued by the Barb City Bank for \$19,500. Also for a failure to decree in favor of appellees as to the so-called Kelso note. Also, because the court denied them relief as to one-half of the notes, amounting to \$17,700, allowed in settlement of the land transaction. Also for the admission of improper testimony on the part of appellant.

It is, and must be conceded, that so far as the bill sought to set aside the conveyance of the land by appellees to appellant, and the conveyance of the eighty acres of land by Chauncey W. Broughton in his lifetime to appellee, this court has no jurisdiction for the reason that in each case a freehold is involved. But it is contended by appellees, that although we have no jurisdiction to review the action of the court in refusing to set aside the conveyances from appellees to appellant, we still have the right to inquire into

the *bona fides* of the transaction so far as the notes allowed in settlement were concerned. The prayer of the bill was that the deeds be set aside, and that the notes allowed as part of the purchase price be held invalid, and for an accounting in reference thereto. It seems to us that as these notes were a part of the real estate purchase, their validity as well as the validity of the deeds were questions so intimately connected with each other, that separate relief as to either could not well be granted. The transaction must stand or fall as a whole. Separate relief as to the notes could not restore the *statu quo*, and place the parties in the same position they occupied before the deeds were made. The bill treated the transaction as a whole, and no alternative relief is asked or prayed for. It is true there is the usual conclusion containing a prayer for further relief, but we are of the opinion this was not broad enough to warrant the court in decreeing separate relief as to the notes, after finding the conveyances valid and binding. Not only the conveyance and the notes, but also the waiver of the widow's award, was involved in the transaction, and we think the court did not err in refusing relief as to the notes when it found the conveyances valid. Whether the court's finding as to the whole transaction was proper or not, must be determined by the Supreme Court, if the question shall come before that tribunal.

As to the Kelso note, the claim is that the deceased in his lifetime held two notes against Etta D. Kelso, of Longmont, Colorado, one for \$2,000 and the other for \$160, given for back interest, and that appellant by improper means and misrepresentations, obtained possession of these notes and induced Mrs. Kelso to give her in exchange therefor and in place thereof, a note or notes payable to the order of appellant, whereby she converted to her own use so much of the estate which she refused to account for.

The evidence concerning this note transaction is found mainly in the letters of appellant, put in evidence by appellees, and, all the evidence considered, we can not say the court erred in refusing to decree that appellant should

account to the estate for the Kelso notes. She was sworn on this subject in her own behalf and explains the matter not inconsistently with the statements contained in her letters, and even if it be held her testimony was incompetent, her letters must be taken as a whole, and the favorable as well as the unfavorable parts, if any, must be considered together, and when so considered, the evidence would not have warranted the court in finding otherwise than it did as to the Kelso notes.

The most serious questions in the case are as to the propriety of the decree in charging appellant with the Waterman Bank and DeKalb National Bank certificates of deposit on the one hand, and the refusal so to charge her as to the certificates issued by the Barb City Bank on the other; these questions being presented for the consideration of this court by the assignment of errors and cross-errors, filed respectively by appellant and appellees.

Appellant's claim to all these certificates of deposit rests upon the proposition that they were given to her by Chauncey W. Broughton in her lifetime, and were valid and executed gifts prior to his death, while, as we have seen, the claim of appellee is, that her title rests upon fraud, perjury and forgery, it being distinctly charged in the bill as amended that appellant forged the name of her deceased husband to the assignment and instruments of assignment which purport to vest the title in her. This is a most serious charge, and to warrant a decree finding appellant guilty thereof the evidence should be at least clear and satisfactory, and rest upon something definite and certain, and not mere suspicion. A very large amount of evidence has been taken upon this point by the respective parties, which we can not pretend to discuss in detail, although we have read it all and given it the careful and patient examination and consideration which the importance of the case entitles it to receive at our hands. In the main, we can only give our conclusions.

The evidence introduced by appellant to sustain her title to these certificates of deposit was, that on February 9,

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1893, her husband executed a paper of which the following is a copy, viz.:

“CARLTON, February 9, 1893.

I, Chauncey W. Broughton, do, this 9th day of February, 1893, give to my wife, Isabella B. Broughton, all my bank certificates of deposit, as her own property.

C. W. BROUGHTON.”

“Witnesses:

E. P. ORR.

H. H. WANN.”

And that on April 17th following he made a further assignment in writing, as follows:

“CARLTON, April 17, 1893.

I, this day give to my wife, Isabella B. Broughton, all my bank certificates deposited since February 9, 1893, as her own personal property, and I transfer them to her.

C. W. BROUGHTON.”

“Witnesses:

E. P. ORR.

H. H. WANN.”

These subscribing witnesses, Orr and Wann, were sworn and examined as to these instruments of assignment, and give in detail the circumstances under which they are alleged to have been executed, relating the conversation which took place and the declarations of deceased in relation thereto, and swear positively that they heard him dictate the contents of the instruments to Mrs. Broughton who wrote them, and that they saw him sign his name thereto, and also saw him indorse his name upon the back of the certificates which bear his indorsement. They detail the circumstances under which they came to be at the home of the deceased on the occasion when the first dated paper was signed, and swear that on the second occasion they came at his request, in pursuance of an arrangement made when they were there the first time. Their testimony certainly bears an air of probability, and either the papers were drawn and signed and the certificates indorsed as they swear, or they have united in concocting, or assisted in fabricating, a story which is wholly untrue, and to maintain which they must have committed willful and corrupt perjury. We fail to find

in the evidence anything which would show a sufficient motive or interest on their part to induce the commission of such a crime simply to aid appellant. It is insisted on the part of appellees that inasmuch as some of the certificates of deposit, which purport to have been assigned by this instrument of February 9, 1893, were not in fact issued until the next day, that the testimony of Orr and Wann and appellant must necessarily be untrue. After this fact was developed in the evidence, Orr and Wann were again examined as to the date of the first occurrence when they signed as witnesses, and they then fixed the date as February 11, 1893. In this they were corroborated by appellant Charles Broughton, Chauncey Broughton, and, to some extent, by Rufus B. Chandler, who testifies that on the 14th of February, when the will was executed, deceased told him that the Saturday before he had given the certificates of deposit to appellant. While this discrepancy as to dates appears at first blush somewhat suspicious, yet it can not be said that it is sufficiently so to overcome the positive sworn testimony of so many witnesses. The important fact after all is, whether the paper was signed by the deceased as sworn to by the witnesses. They might readily be mistaken as to the date, but they certainly could not be mistaken as to the facts of the execution of the papers, which they detail with so much circumstantiality. As we have already said, either the papers were executed as testified to by Orr and Wann, or they have committed deliberate perjury. No other conclusion can reasonably be arrived at.

As to the certificates of deposit issued by the Barb City Bank, amounting to \$19,500, the court below found in favor of appellant. Of this amount all but \$400 of the certificates were issued and in existence prior to April 17, 1893, the date of the last assignment sworn to by Wann and Orr. These certificates were not indorsed by Mr. Broughton as those on the other banks were. Orr and Wann both testify that deceased said the Barb City Bank certificates did not need indorsing because they were payable to his wife as well as himself. The witness Samuel P. Bradshaw, who was

cashier of the Barb City Bank during the year 1893, testifies that after the certificates were issued to Chauncey B. Broughton, he, Bradshaw, interlined after the word "himself" (which meant Chauncey B. Broughton) the words "or Mrs. B. B. Broughton," and that such interlineation was made at the request of deceased, contained in a letter brought to the witness by Mrs. Chandler, who also delivered to him the certificates at the same time. He was shown the fourteen certificates of deposit issued by the Barb City Bank, and swears that he thinks he interlined in all of them the words "or Mrs. B. B. Broughton," so that they were payable either to deceased or to appellant. But whether this change was made in all the certificates at the same time, or at different times, the witness was not certain. Mrs. Anna B. Chandler testifies that in the winter of 1893, in the early part of February, she was visiting at the home of deceased, and when about to return to her own home in De Kalb, deceased handed her an envelope containing some certificates, and also directions to Mr. Bradshaw what to do with them, and requested her to go to the bank and give them to Mr. Bradshaw, which she testifies she did. That the certificates were made payable to C. W. Broughton, and that the order to Mr. Bradshaw was, that he write on the certificates, after the word "himself," the words, "or to Mrs. B. B. Broughton," and that she saw Mr. Bradshaw make the change.

Mr. Bradshaw was cashier of the bank, and he seems to have had no hesitation in acting upon the order brought to him by Mrs. Chandler and signed by Mr. Broughton. All these circumstances strongly tend to show the intention of the deceased to give the certificates of deposit to his wife, and indirectly at least corroborate the witnesses as to the execution of the papers dated February 9th and April 17th, making assignments thereof to her. It may be possible the intention of deceased was to vest the title in his wife for the more convenient distribution of the proceeds among the legatees named in the will, but there is no proof of such intention, nor is that the case made by the bill. So far as

the certificates of deposit were concerned, all the efforts of complainants below were devoted to the purpose of showing that the assignments, and the papers evidencing assignments, were forgeries. On this point much testimony was taken, and as there were many papers in evidence, bearing signatures of deceased which were admitted to be genuine, abundant opportunity was afforded for comparison and the application of expert testimony. It would not only be a work of great labor, but perhaps a useless task, to attempt to analyze all the evidence bearing upon this charge of forgery. Upon the one side the testimony of the expert witnesses and that of others who were examined on that subject, tends to cast doubt and suspicion upon the genuineness of the signatures upon which the assignments depend for their validity, while on the other hand the evidence is fully as strong, if not stronger, that the signatures are genuine. It is within the range of common experience and observation, that the genuine signatures of the same person vary greatly according to the circumstances and conditions under which they are written, and experts on handwriting can always point out differences upon which to base an opinion as to genuineness or otherwise. In this case much stress is laid by counsel for appellees on the testimony of the experts Ewell and Tolman, and their well-known reputation no doubt entitles them to great credit, but we are not inclined to the view that it should outweigh the testimony of so many witnesses who were personally acquainted with the handwriting of deceased, and had frequently seen him write, and also the positive testimony of the witnesses who swear they actually saw the deceased write the very signatures in controversy. No motive is perceived why these witnesses should commit willful and deliberate perjury to bolster up and assist the perpetration of another crime in which it is not shown they have any interest. Again, it is a somewhat significant fact, that neither of the appellees, nor Preston Broughton, all of whom were children of the deceased and witnesses in the case, attempted to swear that these assignments were not the genuine signatures of their

father. As to the mental capacity of the deceased and his ability to transact ordinary business at the time of these alleged assignments, and for some time thereafter, we think a clear preponderance of the evidence shows that he was capable and competent. True, his eyesight was poor, but the evidence fails to show that there was any time when he could not write his name if his business required it. Without attempting to sum up the testimony of the several witnesses, or give the evidence in detail, our conclusion is that the charge of forgery is not proven.

While there are many things in the record tending to cast suspicion on the honesty and good faith of the appellant, and leading to the belief she has not dealt fairly in all things with appellees—such, for instance, as her actions with regard to the McCleary note, the pretended sale of the chattel property to John McGirr, who, for \$5 paid him by Roberts, the husband of appellant, bought the chattel property on the farm, or pretended to buy it when, in fact, he was acting for appellant and her husband. The loss of the original notes amounting to \$17,700, one-half of which was allowed on the purchase price of the land in the arbitration proceeding, also has an appearance of suspicion, yet we can not say that all these things, suspicious though they may be, are sufficient to make out the charge of forgery as to the assignment of the certificates of deposit.

It was formerly the rule in this State, that in a civil case, when it was necessary to establish facts which show a crime, the same degree of proof was required to sustain the action or defense as would be required to procure a conviction under an indictment for the same offense. That is, proof beyond a reasonable doubt. *Harbison v. Shook*, 41 Ill. 141; *Crandall v. Dawson*, 1 Gilm. 556; *McConnell v. The Del. M. S. Ins. Co. et al.*, 18 Ill. 228.

In *Sprague v. Dodge et al.*, 48 Ill. 142, it was held that in civil actions, when either party relies upon establishing a criminal offense against the other, the presumption of innocence should only be yielded upon satisfactory evidence of guilt. And although clearer proof would be required in

such case than in one involving no criminality, yet the sufficiency of such proof is to be determined by the jury and need not be of such character as shall satisfy them beyond a reasonable doubt. In the case of *Oliver et al. v. Oliver*, 110 Ill. 119, the bill sought to set aside a deed on the ground of forgery, and it was held that the charge of forgery was one which the complainant was bound to prove affirmatively by clear and convincing proof before relief could be granted.

The rule, as laid down by Greenleaf on this subject, is as follows:

“To support a special plea in justification, where *crime* is imputed, the same evidence must be adduced as would be necessary to convict the plaintiff upon an indictment for the crime imputed to him; and it is conceived that he would be entitled to the benefit of any reasonable doubts of his guilt, in the minds of the jury, in the same manner as in a criminal trial.” 2 Greenl. on Ev. (13th Ed.), Sec. 426.

In the case of *Grimes v. Hilliary*, 150 Ill. 141, our Supreme Court recognize the doctrine upon this subject laid down in the earlier cases above cited, but a doubt seems to be implied as to whether the rule of these cases is to be adhered to, and as to this question no opinion is expressed.

So far as this State is concerned, therefore, it seems to be still an unsettled question as to whether or not, where a criminal offense is charged in the pleadings in a civil case, it is necessary to prove the charge beyond a reasonable doubt. We think it safe to hold, however, that a mere preponderance of the evidence is insufficient to overcome the presumption of innocence, and that to sustain the charge, the evidence should be clear, convincing and satisfactory.

Applying this rule to the case at bar, we are of the opinion appellees have not established the charge of forgery against appellant. To hold that they have done so, is to convict some seven or eight witnesses, other than appellant, of the further charge of willful and corrupt perjury. This we are unwilling to do upon the evidence as it now stands in the record.

It is insisted by appellees that the court admitted improper testimony in allowing appellant to testify as to certain matters involved in the case, and particularly as to the assignment to her of the certificates of deposit by the deceased. As to the fact of such assignment being made, the transaction being in the lifetime of deceased, and the complainants having sued as legatees and devisees under the will, appellant was, no doubt, incompetent to testify, except as to matters which had been so put into the record by appellees as to render her competent within the exceptions of the statute. As to the subject of the assignment of the certificates, and the alleged gift of them to her by the deceased, appellees saw fit to introduce her statements and declarations, and they thereby became competent evidence in the case, either for or against her as the court might regard them, and as to all matters arising since the death of her husband she was a competent witness. We must presume the court below only considered competent evidence, and we think there is nothing in the record requiring a reversal of the decree on this cross-error assigned by appellee.

Error is assigned by appellant upon that portion of the decree taxing all the costs of the case against her, but the record does not show that an appeal was taken from that part of the decree, and that assignment of error will, therefore, not be considered.

Many matters appearing in the arguments of counsel have not been referred to in this opinion, and could not be discussed without extending it to an unreasonable length, but they have all been carefully considered and given such weight as we deemed them entitled to.

So much of the decree as pertains to the Barb City Bank certificates of deposit will be affirmed, and also so much of the decree as relates to the chattel property which has been acquiesced in by the parties and not appealed from.

That portion of the decree pertaining to the Kelso notes of \$2,160 will also be affirmed. They were in possession of appellant at the death of deceased and the proofs do not show they belonged to his estate. The letter of appellant put in evidence by appellees shows the contrary.

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So much of the decree as requires appellant to account for the certificates of deposit issued by the Waterman Bank and the DeKalb National Bank for the aggregate sum of \$14,680, with interest thereon, as a part of the estate of Chauncey W. Broughton, deceased, is reversed. As to all other matters the decree will be affirmed.

The motion of appellant to strike the cross-errors from the files is denied, but in so far as they may involve a freehold, over which we have no jurisdiction, they have not been considered.

The decree is therefore affirmed in part and reversed in part, as above stated, and the cause will be remanded with directions to the Circuit Court to enter a decree in accordance with the views herein expressed.

Edward H. Nevitt, James Dinsmoor, Jarvis Dinsmoor, Impleaded with James H. Woodburn and Phebe A. Woodburn, v. Charles H. Woodburn, May McD. Woodburn, Beatrice L. Woodburn.

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1. **POWERS**—*Coupled with an Interest*.—A power coupled with an interest is where the power or authority is coupled with an interest in the thing itself, actually vested in the agent. It is not an interest in that which is produced by the exercise of the power.

2. **WILLS**—*What is a Devise of Personalty*.—Where a will directs the executor or trustee to sell real estate for the purpose of creating a fund to be invested for the use of life tenants, the will is to be regarded as a devise of personal property and not of real estate.

3. **PERPETUITY**—*Defined*.—A perpetuity in this State is defined to be a limitation taking the subject thereof out of commerce for a longer period than a life or lives in being and twenty-one years beyond.

4. **SAME**—*What is Void as Such*.—A devise to the children of W., but subject to the limitation that in case they die childless the fund shall go to the other persons named, is void as against the rule prohibiting perpetuities, and the title vests in the children of W.

5. **PARTIES**—*When a Ward is Not a Necessary Party*.—In a proceeding by a conservator to sell land for the support of his ward, the latter is not a necessary party, for the reason that the proceeding is not adverse to the ward but for his benefit.

6. **SAME—Not Before the Court—Not Bound by the Decree.**—It is a general rule, subject, however, to certain well recognized exceptions, that in proceedings in equity the interests of parties not before the court will not be bound by the decree.

7. **SAME—Exception to the Rule—The Doctrine of Representation.**—Among the exceptions to the rule that parties not before the court are not bound by the decree, is one growing out of convenience or necessity in the administration of justice, which has given rise to what is known as the doctrine of representation. So where it appears that a particular party, though not before the court in person, is so far represented by others that his interests receive actual and efficient protection, the decree may be held to be binding upon him.

8. **SAME—In Suits Concerning Trust Property.**—In suits respecting trust property, brought either by or against the trustees, the *cestuis que trust* (or beneficiaries) as well as the trustees are necessary parties.

9. **TRUST FUNDS—Power of Courts Over.**—Courts will not permit a trust fund to be dissipated by litigation not necessary for the protection of the fund itself without affording a remedy to the actual owners of such fund.

10. **SAME—Cestui Que Trust May Pursue the Proceeds.**—The *cestui que trust* may pursue the proceeds of trust property and charge with the original trust any property in which they may be invested as against all who have actual or presumptive notice of the trust.

11. **TRUSTEES—Duty to Keep the Fund Intact.**—It is the duty of the trustee to keep the fund which comes to his hands intact. If he fails to do this he should be charged with the amount of the depletion.

12. **SAME—After Removal Not Entitled to Have a Construction of the Will.**—After the removal of a trustee, as trustee of a fund, by the court, he is not entitled to have a construction of the will creating the trust unless it should appear that he has been improperly removed.

Bill for Injunction and Other Relief.—Trial in the Circuit Court of Whiteside County; the Hon. JOHN C. GARVER, Judge, presiding. Decree for complainants; error by defendants. Heard in this court at the December term, 1898. Affirmed in part and reversed in part with directions. Opinion filed May 19, 1899.

JARVIS DINSMOOR, attorney for plaintiff in error.

In the Woodburn will there is no devise of land, but only the proceeds of land. The doctrine of equitable conversion obtains, and equity must look upon this land as money. *Baker v. Copenbarger et al.*, 15 Ill. 103; *Jennings v. Smith et al.*, 29 Ill. 116; *Rankin v. Rankin*, 36 Ill. 293; *In re Corrington*, 124 Ill. 363; *Ebey v. Adams*, 135 Ill. 80; *Crerar v. Williams*, 145 Ill. 625; *Glover v. Condell*, 163 Ill. 566;

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Banta v. Boyd, 118 Ill. 186; Davenport v. Kirkland, 156 Ill. 178.

A perpetuity in this State is defined to be a limitation taking the subject thereof out of commerce for a longer period of time than a life, or lives in being, and twenty-one years thereafter. Hale v. Hale, 125 Ill. 409; 3 Cruse Dig., Title 38, Ch. 9, Sec. 33; 18 Ency. of Law, 339.

"A limitation void because it offends against the doctrine of perpetuities will be void altogether, and can not be held, under the Cypress rule of construction, to be good as to that part which keeps within the period of perpetuity, and void only as to excess." Post v. Rhorback, 142 Ill. 600; Lawrence et al. v. Smith et al., 163 Ill. 149.

One can not empower a trustee to limit the estate beyond the limits of the rule against perpetuities. 1 Perry on Trusts, 470, Secs. 383 and 390; 2 Redfield, Wills, 573, Sec. 21 (2d Ed.).

"The doctrine of representation, as understood and administered by courts exercising chancery powers, recognizes the rule that all persons interested in property which is the subject of litigation, need not be made parties to the proceedings. All that is required is that a person should be present as a party who will act as the present owner and protector of the interest or right that is drawn into controversy. If the interest or right receives an effective protection from those who are parties, the proceeding takes place with as equal certainty of justice as if all persons consequentially or derivatively interested were joined." Clark v. Cordis et al., 4 Allen, 466; Cross v. DelValle, 1 Wall. (U. S.) 16; Mead v. Mitchell, 17 N. Y. 210; Regan v. West, 115 Ill. 609; Story Eq. Pl., Sec. 144; Knotts v. Stearns, 1 Otto (U. S.) 638; Adair v. The New River, etc., 11 Ves. 429.

MORRISON & BETHEA and C. H. WOODBURN, attorneys for defendants in error.

Where a devise is made to one person for life, with remainder to his children, the remainder will vest in the children on the death of the testator. Schaefer v. Schaefer,

141 Ill. 337; Voris v. Sloan, 68 Ill. 588; Welsch v. Belleville Savings Bank, 94 Ill. 191; Nicoll v. Scott, 99 Ill. 529; Smith v. West, 103 Ill. 332; Cheney et al. v. Teese et al., 108 Ill. 474; Marvin v. Ledwith, 111 Ill. 144; Female Academy v. Sullivan, 116 Ill. 375; Railsback v. Lovejoy, 116 Ill. 442; Scofield v. Olcott, 120 Ill. 362; Ducker v. Burnham, 146 Ill. 9.

A trustee is bound to manage and employ the trust property for the benefit of the *cestui que trust* with the care and diligence of a provident owner. Hutchison v. Lord, 1 Wis. 249; Lewin on Trusts, 299; Pom. Eq. Jur. 1090.

Where one of several *cestuis* converts to his own use moneys belonging to the others the trustee may retain after-acquired income to make good the indebtedness thus created. Crocker v. Dillon, 133 Mass. 91.

A rise in the value of trust investments like rise in the value of lands held in trust, has always been regarded as an accretion of the principal and therefore belonging to the remainderman. Hubley's Est., 16 Phila. 327; Hill on Trustees, 175; Van Vleck v. Lounsberry, 34 Hun, 569; Muege v. Parker, 139 Mass. 153; Parker v. Johnson, 37 N. J. Eq. 366; 2 Perry on Trusts, Sec. 546.

MR. JUSTICE HIGBER delivered the opinion of the court.

An appeal was originally taken from the decree in this case directly to the Supreme Court, where a motion was made to dismiss the same for want of jurisdiction, on the ground that no freehold was involved. The court sustained the motion and dismissed the appeal. In passing upon the motion, a full and complete statement of the case was made by the court, to which we refer. (See Nevitt et al. v. Woodburn et al., 175 Ill. 376.) In the same connection we also refer to the statement of the case in Woodburn v. Woodburn, 123 Ill. 608. Phebe A. Woodburn, one of the defendants below, filed her motion in this court for leave to withdraw the cross-errors assigned for her, and the brief and argument filed in support thereof, by James Dinsmoor, who is a plaintiff in error. This motion is supported by her affidavit,

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in which she states that "the said James Dinsmoor has appeared for her and filed said cross-errors and brief and argument without her knowledge or consent and against her wishes; that the said James Dinsmoor is not her attorney and has no authority to appear for her in any matter whatever; that any authority the said James Dinsmoor ever had to represent her was long since revoked by her." In further support of her motion said Phebe A. Woodburn filed a notice signed by her, purporting to have been served on said James Dinsmoor on November 28, 1896, in which she notifies him that he is no longer her attorney and forbids him to act as such thereafter. The motion concludes as follows: "And I hereby revoke any grant of authority or power of attorney heretofore made to you to act as my attorney or solicitor in my business, as fully and completely as though the same had not been given or granted to you." James Dinsmoor resists the motion, for the reason, as alleged in the affidavit filed for him, that on the 22d day of June, 1893, the said Phebe A. Woodburn was indebted to him in the sum of more than two hundred dollars, paid by him in her behalf upon a bond which he had signed with her as surety; that on the 27th day of June, 1893, in consideration of said indebtedness she executed to him a power of attorney, coupled with an interest, giving him authority to act for her in this suit; that said Phebe A. Woodburn had a pecuniary interest in the fund in litigation; that she has never paid his debt, and that therefore he is entitled to assign said cross errors and file a brief in support thereof, without regard to her wishes.

James H. Woodburn, also one of the defendants below, files his affidavit in which he states that since the giving of said power of attorney the said Phebe A. Woodburn has sold and transferred to him all her interest in said fund or estate and has now no interest therein.

If Mrs. Woodburn still has control of the suit so far as it concerns her, she unquestionably has a right to withdraw the assignment of errors and the brief and argument in support thereof filed for her. Her right to so control

her suit involves in the first place the question whether the power of attorney conferred upon Dinsmoor the authority to appear for her and assign errors in this cause, and if so the further question whether it had been legally revoked by Mrs. Woodburn. The power of attorney executed by Mrs. Woodburn recites the fact that there is a suit pending by James H. Woodburn and others; that she desires said litigation to be ended, that she may realize some immediate income or profit from the fund involved, and that she is indebted to James Dinsmoor in consequence of his having signed a certain appeal bond with her. By said power of attorney she therefore authorizes the said James Dinsmoor to effect a complete settlement of all the matters, suits and controversies existing between her, James H. Woodburn and others. She further authorizes him to settle, compromise and adjust her claim in and to the estate or fund in question, and to sign her name to any written agreement that may embody the terms of settlement between the parties interested in the fund and herself. While the power of attorney also authorizes said Dinsmoor to appeal in her name from all orders or judgments of the court made or to be made against her, yet we are of opinion that it was simply intended to, and did, authorize Dinsmoor to effect a settlement or compromise of the matters in controversy and did not empower him to assign errors for her in this case against her express desire. Nor do we think the power of attorney gave Dinsmoor such an interest in the fund in question that it could not be revoked. It only gave him the right to retain out of any money received by him in settlement of the matter in controversy an amount sufficient to liquidate said indebtedness to Mrs. Woodburn to him, and also "all other costs, fees and expenses incident to the said settlement or compromise." No settlement or compromise was ever effected, and it does not appear that any was ever attempted. "A power coupled with an interest" is where the power or authority is coupled with an interest in the thing itself, actually vested in the agent. It is not an interest in that which is produced by the exercise

of the power. (*Walker v. Denison*, 86 Ill. 142.) The interest given to Dinsmoor was not a lien upon or interest in the fund itself, but only a right to reimburse himself and pay costs out of the proceeds of the collection made by him from settlement or compromise. The power could therefore be revoked by Mrs. Woodburn, and as she has exercised her right and revoked the power, her motion for leave to withdraw the cross-errors and the brief and argument filed for her, without her consent, will be sustained and the leave granted. The withdrawal of the cross-errors does not affect the principal questions presented by the record, and they will be considered in order.

First. The provision of the will of George W. Woodburn, Sr., with which this litigation is mainly concerned, is as follows :

“ I hereby will, direct and request, and by this, my last will, do place in the hands of my executor all my real estate, being the farm upon which I live, and do direct him to sell what may be necessary for the payment of my debts; also to sell an amount sufficient to raise a fund sufficient to pay the interest to my beloved wife, Phebe Ann Woodburn, one thousand dollars per year, which amount shall be for her support during her lifetime, and, at her death, this fund shall go to my legal heirs, in the order below mentioned; that is, to my son James H. Woodburn, if living, for his use during his lifetime, at his death to go to his children, and at their death, if childless, to go to and be divided among the families of my brother William H. Woodburn, John M. Woodburn and Jane E. Ege.”

It is insisted by counsel for plaintiffs in error that the limitation over, after the provision made for Phebe Ann Woodburn, is void, as contravening the doctrine of perpetuities, and that therefore the complainants in the original bill had no interest in the fund in question which entitled them to maintain their suit. It was held by the Supreme Court, when this case was before it (*Nevitt v. Woodburn*, 175 Ill. 376), that “where a will directs the executor or trustee to sell real estate for the purpose of creating a fund to be invested for the use of life tenants, the will is to be regarded as a devise of money or personalty, and not of

land," and that "the principal fund here in controversy must therefore be regarded as personalty." But in determining whether or not a limitation is void, as offending against the doctrine of perpetuities, the same rule applies to personalty as to real estate. "There are no remainders in personalty; all future limitations of personalty are executory limitations. But to determine whether they are vested, as that term is used with reference to questions of remoteness, the test to be applied is: would they be vested if they were legal limitations of realty?" (Gray on The Rule Against Perpetuities, Sec. 117, p. 71.) In *Hale v. Hale*, 125 Ill. 399, it is said "a perpetuity in this State is defined to be a limitation taking the subject thereof out of commerce for a longer period of time than a life or lives in being, and twenty-one years beyond."

It can not be denied that conditions might arise, under the provision of the will in question, which would suspend the right of alienation beyond the lives of those persons mentioned therein and for more than a period of twenty-one years thereafter. We do not understand, however, that the whole provision of the will above mentioned is thereby rendered void, but only the limitation which violates the rule against perpetuities. In the case of *Post v. Rohrbach*, 142 Ill. 600, the testator devised real estate to his daughter, subject to the limitation that if she should die without leaving a child or children, or if she should die leaving a child or children surviving her, and such child or children should die without leaving a child or children surviving them, or one of them, it should revert to such of the other children and descendants of deceased children of the testator as should then be living. It was there held that the limitation over was void because it might not have taken effect in possession within a life or lives in being and twenty-one years thereafter, and that therefore the daughter took the title in fee simple, free from all conditions.

It is provided by the will in question that at the death of Phebe A. Woodburn the fund shall go to the testator's son, "James H. Woodburn, if living, for his use during his

lifetime, at his death to go to his children and at their death, if childless," to go to other relatives of the testator. At the death of the testator, his wife Phebe A. Woodburn, his only son James H. Woodburn, and the two sons of the latter, George W., Jr., and Charles H. Woodburn, were all living. It will be observed that nothing is devised to the children of George W., Jr., and Charles H. Woodburn. The devise is simply to the children of James H. Woodburn, but subject to the limitation that, in case they die childless the fund shall go to the other persons named. We hold that this limitation is void as against the rule prohibiting perpetuities and that the title to the fund in question vested in George W., Jr., and Charles H. Woodburn, the two sons of James H. Woodburn, at the death of the testator, subject to the life interests of Phebe A. Woodburn and James H. Woodburn, as provided for by said will, and subject also to the possibility that the devise might be opened up upon the subsequent birth of children to James H. Woodburn, so as to let them in to an interest in said fund. The complainants in the original bill were therefore the proper parties to bring suit for any impairment of the principal fund.

Second. Are the owners of the fund in question bound by the decrees and orders of court entered in the suit of Phebe A. Woodburn v. James H. Woodburn and others, brought in the Circuit Court of Whiteside County in 1880, which was taken by writ of error to the Appellate Court, and from there on appeal to the Supreme Court and reported in 123 Ill. 608? That suit was composed of several suits which were consolidated by an order of said Circuit Court at the March term, 1881, and included a bill in chancery, filed by Phebe A. Woodburn against Peter Ege, former trustee of the fund and executor of the estate, for an accounting and asking for his removal; a suit by James H. Woodburn against Phebe A. Woodburn and Peter Ege, for an injunction and to correct the description in a deed to certain premises purchased by Phebe A. Woodburn at the trustee's sale; a cross-bill by Phebe A. Woodburn to set aside an agreement in reference to her life interest in said

fund, formerly made between herself and James H. Woodburn, and two appeals by Peter Ege, executor, from the County Court, one in the case of an order to pay over to Mrs. Woodburn a certain sum found to be due from him, and the other in the case of a final report, made by him as executor.

George W. Woodburn, Jr., the father of the minor defendants in error, now deceased, but who was living when all the decrees and orders were entered in the consolidated suit, and defendant in error Charles H. Woodburn, were not parties to the suit at any stage of the proceedings. It is insisted however that they were represented by their father, James H. Woodburn, and that any decree or order binding upon him would also bind them, under the doctrine of representation. We have examined the cases cited by counsel for plaintiffs in error and are of opinion they do not support the position taken.

In *Dodge v. Cole*, 97 Ill. 338, it was held that in a proceeding by a conservator to sell land for the support of his ward, the latter was not a necessary party, for the reason that the proceeding was not adverse to the ward but for her benefit.

In *Hale v. Hale*, 146 Ill. 227, it was said :

"It is unquestionably a general rule, subject however to certain well recognized exceptions, that in proceedings in equity the interests of parties not before the court will not be bound by the decree. But among the exceptions is one growing out of convenience or necessity in the administration of justice, which has given rise to what is known as the doctrine of representation. Thus, where it appears that a particular party, though not before the court in person, is so far represented by others that his interests receive actual and efficient protection, the decree may be held to be binding upon him."

It was, however, further said in the same case, "It is not disputed that all persons *in esse* who have any possible interest in the estate were before the court," and the court held that the possible interests of persons not then *in esse*, which were identical with the interests of the defendants before the court, would be bound by the decree.

Story in his Equity Pleadings, Sec. 144, says, in speaking of the doctrine of representation :

“ Upon similar grounds of a virtual representation of all the proper interests, where there is real estate in controversy which is subject to an entail, it is generally sufficient (all the parties having antecedent estates being before the court) to make the first tenant in tail *in esse*, in whom an estate of inheritance is vested, a party with those claiming the prior interests, without making any persons parties who may claim in remainder or reversion after such vested estate of inheritance.”

The other authorities cited by plaintiffs in error are similar in effect to the above, or are based upon cases which were governed by special laws of the several States in which they arose. None of the authorities cited however apply strictly to the case before us.

The title to the fund in controversy here was vested in George W., Jr., and Charles H. Woodburn, both of whom were living at the death of the testator. There was no reason why they could not have been made parties to the suits, and no occasion for them to be represented by other persons. In the opinion filed in the consolidated case in the Appellate Court, Woodburn v. Woodburn, 23 Ill. App. 289, it is said, “ It will readily be perceived there are other persons having an interest in this fund who were not before the court in these chancery proceedings, and it was error in the court to confiscate their rights and equities and turn over a part of the principal of the fund to the first life tenant.” The general rule is that in suits respecting trust property, brought either by or against the trustees, *cestuis que trust* (or beneficiaries), as well as the trustees are necessary parties. Story’s Equity Pleadings, Sec. 207; Scanlan v. Cobb, 85 Ill. 296.

In Butler v. Butler, 164 Ill. 171, which was a case where a trust fund was created by will and trustees appointed, with directions to invest the fund and pay the income therefrom to the testator’s son for life, and at his death to his widow and children, under certain limitations, it was held, that the son’s wife and children “ were *cestuis que trust* in the fund created by the will, and therefore necessary parties

to the chancery proceedings wherein the trustees named in the bill were removed and a new trustee appointed in their place;" that "said wife and children not being parties, the appointment made was invalid as to them, and gave to the trustee appointed no authority to make any contract, or do any act that would be binding upon their reversionary rights and interests."

It follows from what is above said that George W., Jr., and Charles H. Woodburn, being *cestuis que trust* in the fund created by the will of George W. Woodburn, Sr., could not be bound by the decrees and orders entered in the consolidated suit, or any other suit to which they were not parties, and that the trustee appointed in the consolidated suit had no authority to do any act which would be binding upon their rights and interests.

Third. Has the principal fund been unlawfully depleted, and if so, to what extent?

The original fund set aside by Peter Ege to constitute the trust fund contemplated by the will, amounted to \$10,180. It consisted of the notes of the widow, Phebe A. Woodburn, amounting to \$2,180, secured by a mortgage on the homestead and two and one-half acres of ground, and the notes of James H. Woodburn for \$8,000, secured by mortgages on the balance of the real estate sold by Ege as directed by the will. The mortgages of James H. Woodburn consisted of what were known as the "north mortgage," which secured notes to the amount of \$3,247, and the "south mortgage," which secured notes to the amount of \$4,753. A note for \$1,100, given by one Peter Odenthal and secured by mortgage, was also afterward turned over to the trustee by James H. Woodburn. The Odenthal note and mortgage were originally given to the trustee as collateral security for the release of certain lands included in the mortgages of James H. Woodburn. Subsequently, however, it appears to have been regarded by both the trustee and James H. Woodburn as a part of the trust fund. The fund in the hands of Ege therefore amounted to the sum of \$11,280. But whatever the amount of the original fund,

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plaintiff in error, Edward H. Nevitt, who was appointed trustee of the fund to succeed Ege, on April 5, 1883, should only be charged with the several sums belonging to the same, which have come to his hands. Early in the progress of the litigation above referred to one W. A. Sanborn was appointed receiver of the fund in question. While he was so acting the Odenthal mortgage was foreclosed. What became of the proceeds of this mortgage does not satisfactorily appear. It does appear, however, that of the amount received from such foreclosure the sum of \$166.93 was paid Nevitt, and the receipt thereof acknowledged by him. Nevitt also received a \$2,000 note secured by the "north mortgage," the receiver for the time being retaining the other note for \$1,247. Afterward the receiver and Nevitt joined in the foreclosure of the mortgage securing the two notes. At the foreclosure sale Nevitt bid in the premises for the debt and costs and thereafter controlled the whole fund. After the period of redemption had expired, Nevitt sold all the property included in the "north mortgage" for \$4,155, which was more than the whole of the principal fund secured by such mortgage, and he charges himself with having received that amount in notes and cash in 1888. He had received the two notes secured by the south mortgage, amounting to \$4,753, shortly after his appointment, as shown by his receipt, dated April 20, 1883. The whole of the fund originally secured by the notes and mortgages of James H. Woodburn, amounting \$8,000, therefore, came to the hands of the trustee Nevitt intact.

By a decree of the Circuit Court, entered May 19, 1888, in conformity with the decision of the Supreme Court in the said consolidated case, it was ordered "that said Phebe A. Woodburn return to the trustee of said fund the said note and mortgage for \$2,180, which the Appellate and Supreme Courts have found were erroneously delivered to her under a previous order of this court, and that in default of her restoring the same she be charged therewith in the account hereafter to be taken under the direction of this court as to the amount due her from said trustee."

It does not appear that this note and mortgage were ever returned to the trustee, and the question is whether the trustee had in his hands at the time said order was made, or has since received moneys belonging to her, and if so, what amount. From the proceeds of the sale of the "north mortgage" there was received by Nevitt, on September 4, 1888, the sum of \$4,155. Charging him with \$3,247, the amount of the principal fund secured by that mortgage, there still remained the sum of \$908 belonging to Mrs. Woodburn, which should have been applied to the payment of her debt to the principal fund. In February, 1891, Nevitt obtained a decree foreclosing the "south mortgage." A portion of these lands were sold at the foreclosure sale for \$1,501.25 in cash, and the remainder bid in by the trustee for the balance of the debt and costs, amounting to \$6,945. On April 14, 1891, the master in chancery paid to the firm of J. & J. Dinsmoor, composed of the plaintiffs in error, James and Jarvis Dinsmoor, solicitors for the trustee, \$1,051.01, derived from said sale, the balance of the \$1,501.25 having been consumed in costs and commissions.

In his report filed October 22, 1889, the trustee charges himself with \$168 received for rent of lands for 1888, which would be part of the income going to Mrs. Woodburn. From a careful examination of the record we are unable to discover any other moneys received by the trustee from the trust fund. Adding together the \$1,051.01 received from the sale of a portion of the lands secured by the "south mortgage," the \$908 excess from the "north mortgage," and the \$168 received for rent, and we have the sum of \$2,127.01, which is less than the amount the trustee credits himself with having paid Mrs. Woodburn since the decree of 1888. This amount he should have retained to be applied upon the indebtedness of Mrs. Woodburn to the trust fund, and not having done so he must be charged with it. While the remainder of the lands in the "south mortgage" were bid in for more than the amount of the principal fund secured by them, yet it is not certain as to what they are really worth, and they must be taken into account for only the amount for which they stand good to the fund.

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We therefore hold that the trustee, Nevitt, must be charged with the principal of the James H. Woodburn notes amounting to \$3,000, with \$166.93 received by him from the receiver, Sanborn, and with \$2,127.01 which was wrongfully paid by him to Phebe A. Woodburn, aggregating the sum of \$10,293.94. Of this fund there is now in the hands of the trustee, as shown by the evidence, only that portion which is represented by the lands purchased by him at the foreclosure sale of the premises included in the "south mortgage," which we have found to be \$4,753. All the rest appears to have been exhausted by court costs, solicitor's fees, expenses attending the trust and the payment of certain amounts to Phebe A. Woodburn.

It is contended that Nevitt should have credit for certain of the payments so made by him on the ground that they were necessary for the protection of the principal fund. The record however does not show a state of facts supporting this claim. The litigation referred to has been mainly carried on by and between the two life tenants and the trustees, with occasional suits for the foreclosure of the mortgages securing the fund. At no time was it necessary to bring a suit to protect the principal fund. If no suits had ever been brought the principal fund would, in all probability, so far as shown by the evidence, have still been intact. Courts will not permit a trust fund to be dissipated by litigation not necessary for the protection of the fund itself without affording a remedy to the actual owners of the fund.

It is said the will provided that Phebe A. Woodburn should be protected in her rights thereunder and that therefore the principal fund should bear the expense of the litigation with which she was connected. The will contained the following provision on that subject:

"It is my will that the said Phebe Ann Woodburn shall be fully protected in all her rights as given and directed in this will, and I charge my executor to see that my will is fully carried out; and direct him to defend her in all suits at law that may arise from this property."

But up to the time when the litigation commenced, the

interest on the fund was substantially paid. All the disasters which befell the principal fund and the income thereof seem to have largely resulted from unnecessary litigation instituted by her. Under such circumstances it would be manifestly improper to charge the costs and expenses so incurred by her against the principal fund.

It was the duty of the trustee to keep the fund which came to his hands intact. This he failed to do, and he should therefore be charged with the amount of the depletion. This amount we find to be the sum of \$5,540.94 instead of \$5,593.93 as fixed by the decree of the court below.

Fourth. The court below decreed that the complainants recover of James and Jarvis Dinsmoor the sum of \$1,693.79, and that so much of said amount as should be collected from them, be credited to the trustee, Nevitt, in reduction of the amount found due from him. Error is assigned upon this provision of the decree by the Dinsmoors.

It appears from the evidence that the trustee paid the Dinsmoors \$606.28 in 1888, and that he afterward paid them \$108.50, making \$714.78, all of which seems to have been for fees, except \$10 advanced by them for costs. In the argument, filed by them in this case, they admit the receipt of the above sum, and that it was paid to them out of the principal fund. It further appears from the evidence, and is also admitted by them, that from the \$1,051.01 paid by the master in chancery to the trustee April 14, 1891, the latter paid to the Dinsmoors \$979.01 upon the order of Mrs. Woodburn, for the principal and interest of a note they held against her. This money however did not belong to Mrs. Woodburn for her own general use and should have been retained by the trustee to use in the repayment of the amount she owed the principal fund. She was not authorized to devote it to the payment of her other debts, and it must therefore be considered as having been paid to the Dinsmoors from the principal fund. This sum and the \$714.78 above referred to, together, make \$1,693.79 which is the amount charged against them in the decree of the court below.

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They were entirely familiar with the provisions of the will and the condition of the fund, James Dinsmoor having been connected with the litigation from its inception, and Jarvis Dinsmoor for nearly the same time. Both of them appeared for Mrs Woodburn in the consolidated case in the Supreme Court and were, of course, thoroughly conversant with the decision and opinion in the case, and also with the decree subsequently entered by the Circuit Court in accordance therewith. They likewise knew the parties interested in the trust fund and that the persons in whom the title to the same was vested were not parties to the litigation. They must therefore be charged with knowledge of the fact that it was the duty of the trustee both to keep the principal fund in his hands intact, and to retain out of the moneys going to Mrs. Woodburn a sufficient amount to return to the fund what she had taken from it.

"No doctrine is better settled than that the *cestui que trust* may pursue the proceeds of trust property, and charge with the original trust any property in which they may be invested, as against all who have actual or presumptive notice of the trust." *Breit v. Yeaton*, 101 Ill. 242; *Story's Eq. Jur.*, Sec. 1255, *et seq.*

Had the trustee conveyed the real estate securing the fund to which he received title through the foreclosure suits to the Dinsmoors there can be no doubt but that they would have taken the same charged with the trust. The fact that the portion of the fund received by them consisted of money rather than of land, does not relieve it of its trust character, and they therefore took it subject to the trust.

But while as between the defendants in error and the Dinsmoors the latter must account for that part of the trust fund which came to their hands, yet we are of the opinion that the portion of the decree which directed that so much of said amount as should be collected from them be credited to Nevitt in reduction of the amount found due from him, was erroneous. The decree should have been against Nevitt for the whole amount of the shortage, with a provision for crediting him with such sum as should be col-

lected from Phebe A. Woodburn, as hereinafter mentioned. It should have further provided that in case such deficit could not be collected from Nevitt, with such credits as he should be entitled to for moneys received from Mrs. Woodburn, the balance, not exceeding the amount of \$1,693.79, should be recovered from James Dinsmoor and Jarvis Dinsmoor.

Fifth. As the decree of the Circuit Court, entered in 1888 in compliance with the decision of the Supreme Court, directed that the said Phebe A. Woodburn return to the trustee of the fund her said note and mortgage for \$2,180, and as it appears from the evidence that she has never so returned the same, we are of opinion that the portion of the decree in this case which authorized the complainants to have and recover of her the said sum of \$2,180, and that the same when collected should be credited to the trustee Nevitt, in reduction of the amount found due against him, was correct, and should be sustained.

Sixth. On September 4, 1893, plaintiff in error, Nevitt, filed a cross-bill asking for the construction of the will of George W. Woodburn, Sr., deceased, for his benefit as trustee of the fund therein provided for. A demurrer was interposed which was sustained by the court and the cross-bill dismissed. Afterward, on June 8, 1896, said Nevitt filed another cross-bill for a like purpose, which upon hearing was dismissed for want of equity. The action of the court in dismissing these cross-bills is assigned as error. As the court by its decree removed Nevitt as trustee of the fund in question, he was not in any event entitled to have a construction of the will, unless it should appear that he was improperly removed. It is urged that the court erred in removing Nevitt as such trustee, but upon an examination of the record we find the court was fully warranted in decreeing his removal. As Nevitt's relation to the fund was terminated by the decree, there was no reason why he should have been given a construction of the will, and the cross-bills were properly dismissed.

The decree of the court below is therefore reversed in

the respects wherein we have held that it is incorrect; in all other respects it is affirmed, and the cause is remanded with directions to so modify the decree as to conform to the views expressed in the foregoing opinion. The costs of this court will be adjudged against plaintiffs in error.

Affirmed in part, reversed in part, and remanded with directions.

MR. JUSTICE CRABTREE, having entered an interlocutory decree in this cause, took no part in its consideration here.

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86 261

Chicago & E. I. R. R. Co. v. Kate Argo, Adm'x.

1. *NEGLIGENCE—Presumption of, Raised Against Railroad by Violation of City Ordinance.*—Running trains at a speed which violates a city ordinance raises a presumption of negligence against a railroad company under the statute.

2. *MASTER AND SERVANT—Relation Can Not Exist Without the Assent of Both.*—The relation of master and servant can not exist in such a sense as to create the duty of employer and employe without the express or implied assent of both parties. No one can intrude himself into the service of another person independently of such person's consent or acquiescence.

3. *SAME—Volunteer Can Not Charge Railroad Company With the Duty of an Employer.*—The greater weight of authority sustains the doctrine that a volunteer can not charge a railroad company with the duty of an employer.

4. *SAME—Where the Maxim Respondeat Superior Does Not Apply.*—Where a mere volunteer, that is, one who has no interest in the work, undertakes to assist the servant of another he does so at his own risk. In such a case the maxim *respondeat superior* does not apply.

Action in Case.—Trial in the Circuit Court of Iroquois County; the Hon. JOHN SMALL, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1898. Reversed. Opinion filed December 14, 1898. Rehearing denied May 19, 1899.

FRANK L. HOOPER and FREE P. MORRIS, attorneys for appellant; W. H. LYFORD, of counsel.

C. C. CHAMBERLIN and R. W. DOYLE, attorneys for appellee; PAYSON & KESSLER, of counsel.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

On April 13, 1896, Harry Mac Argo, then seventeen years old, was struck and killed by a freight train of appellant at Hoopeston. This suit was brought by his administratrix to recover for the benefit of his next of kin their consequent pecuniary loss. Plaintiff recovered \$3,000 and defendant appeals.

Before the close of the trial plaintiff's pleadings had been reduced to the fifth count of the declaration. It averred the accident occurred within the corporate limits of the city of Hoopeston, and pleaded an ordinance of said city then in force restricting freight trains to a speed of six miles per hour within said limits, and charged it was defendant's duty to run its engine and freight train at a speed not exceeding six miles per hour within said limits; and the count averred that defendant, negligent of its duty in that regard, at said time ran its locomotive and freight train at a speed greatly in excess of that limited by said ordinance, to wit, forty miles per hour; and that while Argo, with all due diligence for his own safety, was lawfully upon said railroad track, defendant so carelessly and improperly drove said engine and freight train that by and through the negligence of defendant in that behalf said engine and train ran against and struck Argo and he was thereby killed. This count was defective in not specifically averring that the death was caused by the act of defendant in running its train at a greater rate of speed than was allowed by the ordinance; but a declaration having a like infirmity was held good after verdict in *L. S. & M. S. Ry. Co. v. O'Connor*, 115 Ill. 254.

Five railroad men testified to the speed of the train, one called by plaintiff and four by defendant. None of them put the speed at less than eight, and none over twelve miles per hour. The railroad man called by plaintiff testified the speed was eight or ten miles per hour. The plaintiff called

five other witnesses on this subject not familiar with the running of trains, one of whom fixed the speed of the train at ten or fifteen miles per hour and the others gave estimates ranging from fifteen to twenty-five miles per hour. It is clear the ordinance was violated, but there are other facts in the evidence which lead us to the conclusion that the higher estimates just stated can not be correct. The accident occurred opposite or nearly opposite appellant's depot at Hoopeston. Appellant's road runs north and south. Fifty feet north of the depot the Lake Erie & Western Railroad crosses appellant's road, running east and west. These railroads have an interlocking system to control the approach of trains to said crossing. Appellant's road has a double track, and the train which struck Argo was an extra, bound south on the west track, and had thirty-four freight cars. As that train approached the railroad crossing it was necessary its engineer should have it under complete control, because, unless the track was so adjusted by the tower man that the train could pass over the crossing, it would be derailed before it reached the other railroad. The system there in use required the engineer to have his speed so reduced that he could if necessary, bring his train to a full stop before he reached the derailing apparatus. The signals and the interlocking machinery were under the control of a man in the tower situated where he had a view of trains approaching from both directions on both railroads. It was not only proved without contradiction that on this occasion the engineer of the freight train in question had its speed reduced, his train under control, and steam shut off as he approached the railroad crossing and signals, but it is evident that the ordinary instincts of self-preservation would cause him to take those precautions. When two or three hundred feet north of the home semaphore the engineer put on steam again and his fireman began putting in coal, and they were going sufficiently slow so that the fireman had finished firing up before they reached the Lake Erie crossing. We think it manifest that a freight train of thirty-four cars, which had shut off steam and slowed down

to such an extent that, if necessary, it might be entirely stopped before it reached the derailing appliances, could not in so short a distance thereafter regain a speed of fifteen to twenty-five miles per hour. On this subject the estimates of the railroad men called on both sides have, in view of these circumstances, greater weight and probability than those made by the inexperienced witnesses who placed such high estimates upon the speed of the train. There is no proof Hoopseton is a populous or crowded city, nor that the railroad passed through a populous or crowded part of Hoopseton. The evidence therefore did not justify the jury in finding that the train was running at a high and dangerous rate of speed or in reckless disregard for human life, nor did plaintiff so aver in the fifth count. Neither the engineer nor the fireman of the south-bound train saw Argo, and therefore there is no foundation for charging them with wantonly or willfully killing him, nor did the fifth count so charge. As appellant was not so charged in the declaration no such issue was before the jury. (C. & A. R. R. Co. v. Robinson, 106 Ill. 142.) All that was proved on that subject was that the train was run at a speed which violated the ordinance. Under the statute this raised a presumption of negligence against appellant. I. C. R. R. Co. v. Ashline, 171 Ill. 313.

Our next inquiry is what relation Argo bore to appellant. Appellant's station agent at Hoopseton was also agent for an express company. Some months before this accident Argo was in his employ for about three months, and assisted him generally in his express and railroad business. The company never authorized the station agent or any other of its employes at Hoopseton to hire Argo or to hire anyone else to assist them, and the company never paid Argo anything, nor is there any proof that any of its officers ever knew that he had been thus employed by the station agent. The hiring of employes for appellant was exclusively in the hands of officers who did not live at Hoopseton. The agent paid Argo from his own funds for the services just mentioned. That relation ceased some months before the acci-

dent. After Argo ceased working there for pay he was often around the depot of his own accord. He was very willing to make himself handy, and helped the railroad men, more or less, about the station. He sometimes assisted in handling the baggage at passenger trains. Van Cleave was the yard clerk and baggage man. On the day Argo was killed Van Cleave wished to attend a funeral. With the consent of the station agent he got Argo to act as his substitute during the funeral, and Argo did so act from one to 4:30 P. M., when Van Cleave returned to duty and relieved him. In the evening Argo was again about the depot.

The block system was in use on appellant's railroad. From Hoopeston to Wellington north constituted one block. After one train had left Hoopeston for Wellington no other train could leave Hoopeston going north until the telegraph operator at Hoopeston had received notice that the first train had reached Wellington, unless the train dispatcher saw fit to send to the second train what was called a permissive card, being a telegraphic permission to enter the block before it was clear. When one train had entered a block and the operator saw another train behind it ready to start, it was customary for him when he reported the departure of the first to notify the dispatcher of the arrival of the second train, and that it was ready to depart, and to ask a permissive card for it. If the operator got the order he signaled the train to come on, and if he was not otherwise engaged it was then his duty, in order to prevent the train from being unnecessarily delayed, to go out and hand one copy of the order to the engineer or head brakeman on the engine, and another copy to the conductor on the rear car. There was a platform on each side of the tracks, and the depot was west of the west platform. If in such a case the train to receive the permissive card was going north and the operator had time to cross over to the east platform east of the tracks before the train reached him he was expected to do so, and to hand the permissive card to the engineer, who sat on the right-hand or east side of the north-bound engine, and to whom the card was addressed. When the operator

thus crossed both tracks and went to the east side of the train, he was in a place of entire safety. If he did not have time to cross over ahead of the north-bound train he either handed the order up from the west side of the engine or let the train stop north of the Lake Erie crossing and a train hand come back for the order. At Hoopeston the second train could, without obtaining permission, pull by the depot and beyond the interlocking system, and then stop and wait till the block was released or till a man went back and got a permissive card. In the center of the depot at Hoopeston was a bay window on the side toward the tracks. The operator's table stood in this bay window.

About a quarter after seven o'clock that evening train No. 70 passed north, and extra 127, a freight train, came up from the south and stopped about a couple of city blocks south of the depot. When it was ready to go and began to move Argo went into the waiting room and from there into the office, got the operator's lantern, came out, gave a signal with the lantern to extra 127 to come on, went back into the office where the operator was getting the permissive card, took two copies which the operator had laid on a table, went out, stood between the tracks till the train came up, and then attempted to deliver a copy to the fireman on the west side of the engine. Argo so held his lantern that the fireman was unable to see and seize the telegram. Argo then ran along side of the train a few steps and succeeded in delivering the order. The fireman called out to Argo to look out for the south-bound train, as did also several other persons. The evidence tends to show Argo had time to cross to the west platform, but that he stood for a little time, and then turned and started back to the depot, and stepped immediately in front of the south-bound train previously described, and was by it struck and killed.

The evidence is conflicting upon the question how Argo came to attempt this service. Just before this he was standing on the platform in front of the bay window. According to a bystander the operator tapped on the window and Argo went in. According to the operator, Argo tapped on

the window and called the operator's attention to extra 127. The operator testified that when some person came in and took the orders from his table he was very busy and did not look at the person, but supposed it was one of the trainmen, and did not at the time know that it was Argo. He did, however, from his bay window, see Argo go out of the waiting room of the depot with the order in his hand, and he then knew Argo was going to deliver it to the train, and he did not attempt to prevent his doing so. In his sworn statement before the coroner's jury the operator said Argo had done this work before in the day time, but not at night, and that he knew Argo understood how to do it. It is claimed by plaintiff there were four other persons in the office at the time, one of whom, called by plaintiff, testified Argo, as he took up the order, said he would deliver it, and the other three testified for defendant, that this other person was not present in the office, and that they did not hear anything said by the person who came in and took out the order. The jury could have found from the evidence that the operator tapped on the window and in that way requested Argo's assistance. It is certain that when Argo went out of the waiting room the operator then knew he had the order and was going to deliver it, and was content that he should do so.

Argo was not an employe of appellant. He had never been hired nor paid by appellant. At the time he was killed he was not acting under any employment for pay by any one, and no one at that station had ever had any authority to hire him to work for the railroad company. The rule governing such a case is thus stated in 3 Elliott on Railroads, Sec. 1305:

"A person can not make himself the employe of a railroad company by his own act, for the relation of master and servant can not exist in such a sense as to create the duty of employer to employe without the express or implied assent of both parties. No one can intrude himself into the service of another person independently of the latter person's consent or acquiescence. It follows from this that no one who, without any employment or any request, express or implied,

from a railroad company, assumes to enter the service of the company, can not create the relation of master and servant. If that relation does not exist, one who assumes to perform service for the company must be regarded as a mere volunteer, without any right whatever to insist that the company owes him a duty as master or employer. Duty can not exist where there is no relation between the parties creating it. The overwhelming weight of authority sustains the doctrine that a volunteer can not charge a railroad company with the duty of an employer. If there is authority to employ the persons who undertake to render service then the general rule will not apply. Ordinarily, trainmen have no authority to employ servants for the company. There may be cases where the circumstances are such as to confer authority, but such cases are exceedingly rare."

Indeed, during the trial of this case, appellee's counsel consented the record should show Argo was not employed. Argo had no personal interest in the work being done. This case is therefore distinguished from those in which the person, though not obliged to act, yet has an interest in the act being done, as where the owner of goods which have been shipped by a railroad company assists its employees in unloading them. In such a case the person is engaged in his own business, and may be entitled to protection from negligence of the servants of the carrier of his goods. But where the person injured has no interest in the act being done the rule is otherwise.

"Where a mere volunteer, that is, one who has no interest in the work, undertakes to assist the servant of another he does so at his own risk. In such a case the maxim *respondeat superior* does not apply." 2 Bailey's Personal Injuries, Sec. 3258; 2 Thompson on Negligence, 1045.

The principle is thus stated in 28 Am. & Eng. Ency. of Law, 499:

"A person who gives his services without any express or implied promise of remuneration in return is called a volunteer, and is entitled to no remuneration for his services, nor to any compensation for injuries sustained by him in performing what he has undertaken."

In *Everhart v. T. H. & I. R. R. Co.*, 78 Ind. 292, an em-

ploye of defendant requested plaintiff to go upon a car and set a brake. Plaintiff complied, and while so engaged was injured by the negligence of the servant of defendant. The court said:

"The plaintiff was a mere volunteer, consenting, at the request or direction of an employe of defendant, to perform services which should have been performed by the employes themselves; and while he can not be regarded as an employe, he is in no better condition than if he had been. Nor is he in any better condition legally than if he had been a mere intermeddler, undertaking to perform the service without request or direction from any one, because, as we have seen, he was not requested or directed to get upon the car and apply the brake by any one having power from defendant to authorize him to do so."

In *Sherman v. H. & St. J. R. R. Co.*, 72 Mo. 62, a lad was paying for a ride on a freight train by doing work on the train by direction of a brakeman. While so employed he was injured. The court said:

"The control assumed by the brakeman over the plaintiff, and his directions to him to render various services on the train, and especially the service in which he was injured, were wholly unwarranted and unauthorized, and the master can not be held liable for the consequences of such acts. When an act done by a servant is within the scope of his employment the master will be liable, although the servant does not obey his orders as to the manner of its performance. But it was no part of the duty of the brakeman, so far as this record shows, to employ or to direct any person, much less a passenger, to perform any service on the train, and if without such authority he negligently led the plaintiff into danger, such negligence is his own and can not be imputed to the master."

In *Flower v. Penn. R. R. Co.*, 69 Pa. St. 210, a boy was climbing upon the tender of an engine to perform a duty of the fireman at the latter's request, and while so engaged was killed. The court, in language very applicable to this case, said:

"This is a very hard case. A willing, bright boy, not arrived at years of discretion, has lost his life in simply trying to oblige the fireman. But we must not suffer our sympathies to do injustice to others by overriding those

fixed principles which underlie the rights of all men and are essential to justice. It is natural justice that one man should not be held liable for the act of another without his participation, his privity or his authority. It is clear that the fireman, through his indolence or haste, was the cause of the boy's loss of life. Unless his act can be legally attributable to the company it is equally clear the company was not the cause of the injury. The maxim *qui facit per alium facit per se* can apply only where there is authority, either general or special. * * * The true point of this case is that in climbing the side of the tender or engine at the request of the fireman, to perform the fireman's duty, the son of the plaintiff did not come within the protection of the company. To recover, the company must have come under a duty to him which made his protection necessary."

Other cases in support of this principle are collected in the notes to *Church v. C., M. & St. P. R. R. Co.* (Minn.), 16 L. R. A. 861, and *Evarfs v. St. P., M. & M. R. Co.* (Minn.), 22 L. R. A. 663. A doctrine, apparently in conflict with the foregoing, is laid down in *Johnson v. Ashland Water Company*, 71 Wis. 553, and cases there cited. We are, however, of opinion that the rule we have stated is supported by the great weight of authority, and that it rests upon established principles. If this had been a case where a man hired by a farmer to run a mower had, without the authority of the farmer, requested or permitted a friend to perform for him some service about the sickle, and while the latter was so engaged in a place of danger he had been hurt or killed by the negligence of some other servant hired by the same farmer, whether a fellow-servant of the first or not, we think no one would consider the farmer liable in damages for the injury. It would, we think, be readily seen that the farmer could not be liable to a man he had never hired or authorized to be hired, and who had voluntarily and unnecessarily put himself in a place of danger about the farmer's business, without the farmer's knowledge or consent.

Where one thus intrudes himself into a position of danger the company, whose servant he is thus voluntarily assisting, owes him the duty of refraining from doing any willful injury, and generally that is its only duty to him. (3 Elliott

on Railroads, Sec. 1305; 2 Bailey on Personal Injuries, Sec. 3261.) Can the inference that the injury was willful or wanton be deduced from the mere fact that the train was run at a speed which violated the ordinance? A negative answer to this question was given in *I. C. R. R. Co. v. Hetherington*, 83 Ill. 510, and *Blanchard v. L. S. & M. S. Ry. Co.*, 126 Ill. 416; and, inferentially so, in *Austin v. C., R. I. & P. R. R. Co.*, 91 Ill. 35. There being neither allegation, direct proof nor inference to justify a finding that deceased lost his life by any willful or wanton act of appellant's servants, the conclusion follows that appellant is not liable in this case.

A further reason exists why we conclude appellee was not entitled to recover. The proof shows Argo stood between the tracks from one to five minutes, waiting for extra 127 to come up. He had time to pass over to the east platform, where he would have been in a place of entire safety, and, according to the proofs, that was the place where the operator should stand to deliver such train order to a north-bound train, if he had time to reach it before the train came along. Argo unnecessarily remained in a place of danger. The headlight of the train which struck him was burning, and was in full view for a distance of half a mile from the place where Argo stood. The proof is clear that the engine of that train gave a long whistle as it approached the station, and two long and two short whistles when from two hundred to three hundred feet north of the depot, and that its bell was ringing. Certain witnesses for plaintiff did not hear the whistles nor the bell, but not only was the giving of these signals sworn to positively by trainmen of both trains, and by the man in the tower house, whose duty it was to watch for the whistles, but also under the usages governing the interlocking system at this place, it was the part of the engineer to whistle, to notify the man in the tower that he wished to cross the Lake Erie tracks. If one train on each road chanced to be approaching at the same time, the one which gave the first whistle was first given the right of way over the crossing. To approach the crossing without

whistling was to render the engineer liable to have his train derailed or unnecessarily stopped. This evidence and these facts and usages make the negative testimony of those who did not hear the signals of little value. Again, there was a distance of nine feet between the west rail of the east track and the east rail of the west track, leaving a clear space of six feet between the freight trains. If Argo had remained where he was when he handed up the telegram he would not have been struck. The preponderance of the evidence also indicates that he then had time to reach the west platform before the south-bound train arrived at that point. He seems to have hesitated a moment, and then stepped immediately in front of the coming train. It is clear that if, at any time after he came out of the depot with the order and up to the time he delivered it, he had looked north he must have seen this train in time to have escaped danger. If he had been listening for signals he must have heard the whistles and the bell. It was night and he could be seen but a short distance. He was familiar with the running of trains at that point, and knew an extra might come along at any time, and knew he was in a place of danger. Under all these circumstances we are of opinion deceased was not exercising due care for his personal safety, and that for lack of such care his administratrix can not recover.

The judgment will therefore be reversed.

MR. JUSTICE WRIGHT, dissenting.

I dissent from all that part of the opinion of the majority of the court that holds the deceased was a mere volunteer, and not entitled to the rights of an employe of the appellant. I concur in the conclusion upon the other reasons contained in the opinion.

Finding of Facts, to be incorporated in the judgment.

We find plaintiff's intestate was struck by a freight train of appellant within the city limits of the city of Hoopeston, and was thereby killed; that said train was running at a speed forbidden by ordinance, but not at a high and dan-

gerous speed, nor in reckless disregard of human life; that deceased was not killed by any willful or wanton act of appellant's servants; that deceased was at that time upon appellant's tracks, assisting a servant of appellant in the performance of his duty, and, as the evidence tends to show, at the servant's request; that deceased had not been hired by appellant, and was a volunteer, and appellant is, therefore, not liable for his death. We further find that at said time deceased was not exercising ordinary care for his personal safety.

Chicago & Alton R. R. Co. v. People, etc., for Use
of, etc.

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1. *HIGHWAYS—Obstruction by Cars—Former Decision Explained.*—The decision (Ill. Central R. R. Co. v. The People, 49 Ill. App. 640) that leaving a car on a railroad track at the intersection of a highway is not a violation of Sec. 14, Par. 83, Ch. 114, S. & C., unless it is an obstruction of public travel, does not hold that there must have been persons actually present desiring to cross, who were prevented from doing so by reason of such obstruction, but only that the car or cars must have been so situated in reference to the highway as to have presented an obstruction to persons desiring to cross, had there been any such persons there at the time.

2. *VERDICTS—Under Penal Statutes—Where Each Count is for a Separate Penalty.*—Where each count in a declaration under a penal statute is for a separate penalty, and the statute fixes a maximum beyond which the jury must not go, it is the best practice for the jury to specify by their verdict the penalty they assess under each count upon which they find for the plaintiff. A gross verdict ought not to stand unless it clearly appears that the jury did not, under any count, exceed the maximum penalty provided by law.

3. *SAME—In Civil Actions.*—In a civil action in debt the rule applicable to civil rather than to criminal cases applies, and the verdict should be sustained unless there are informalities rendering it so uncertain that it is absolutely void.

Debt.—To recover statutory penalties for obstructing a highway. Trial in the Circuit Court of Livingston County; the Hon. GEORGE W. PATTON, Judge, presiding. Verdict and judgment for plaintiff; appeal

by defendant. Heard in this court at the December term, 1898. Affirmed. Opinion filed May 19, 1899.

C. C. & L. F. STRAWN and ANTOINETTE FUNK, attorneys for appellant.

H. H. McDOWELL, attorney for appellees.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This is an action of debt brought to recover statutory penalties for obstructing certain public highways in the city of Pontiac.

The sections of the statute under which the action was brought are as follows:

"No railroad corporation shall obstruct any public highway by stopping any train upon or leaving any car or locomotive engine standing on its track, where the same intersects or crosses such public highways, except for the purpose of receiving or discharging passengers or freight, or for taking in or setting out cars, or to receive the necessary fuel and water, and in no case to exceed ten minutes for each train, car or locomotive engine." Sec. 14, Par. 83, Chap. 114, Starr & Curtis' An. Stat.

"Every engineer or conductor violating the provisions of the preceding section shall, for each offense, forfeit the sum of not less than ten dollars, nor more than one hundred dollars, to be recovered in an action of debt, in the name of the People of the State of Illinois, for the use of any person who may sue for the same, and the corporation on whose road the offense is committed shall be liable for the like sum." Sec. 15, Par. 84, Chap. 114 Id.

The declaration contained seventeen counts, which were similar to each other in general form. Each alleged that appellant, on a certain day, stopped a certain engine with a large number of cars attached thereto in, upon and across a certain public street and highway in said city of Pontiac, so that the same was wholly blocked and obstructed for a long space of time, to wit, for the space of more than ten minutes, contrary to the form of the statute in such case made and provided.

The counts differed only as to time and place, and the

name of the street alleged to have been obstructed. The jury found the defendant guilty upon the second, fourth, fifth, sixth, seventh and eighth counts, and fixed the penalty at the sum of \$120. Motions for a new trial and in arrest of judgment having been overruled, judgment was entered for the amount of the verdict and an appeal taken by the defendant below to this court.

It is urged that the court erred in overruling the appellant's motion for a new trial, upon each and every of the reasons given in writing in support of said motion. As there were thirty-four reasons given by appellant in support of his motion, we can not be expected to consider them all here, but will content ourselves with referring to several of the more important.

The first is that the verdict is not supported by the evidence. The witness H. H. McDowell swears positively to the obstruction of the several streets upon the occasions and for the length of time set forth in the several counts upon which defendant was found guilty, and he is corroborated to some extent by two other witnesses. The defendant, while producing other evidence tending to contradict the statements of McDowell as to one or two occasions, relied mainly upon the evidence of one Gray, its train dispatcher, whose duty it was to look after the movement of trains on the Chicago division of the appellant's railroad from Bloomington to Chicago. This witness had no personal knowledge of the matter in controversy and was not in Pontiac at the several times the obstructions were alleged to have occurred, but relied for his information upon certain "train-sheets" which were made up in his office and purported to give a detailed statement of the arrival of trains at Pontiac and their departure therefrom, during the days in question. These "train-sheets" are not contained in the bill of exceptions, but certain statements read from them by the witness are included in his testimony. The "train-sheets," so far as it appears from the testimony of Gray, fail to show any trains, such as those described in the declaration, located in Pontiac at the times testified to by McDowell. It appears,

however, that the entries on the "train-sheets" are made up from the reports received from telegraph operators along the line of road, and further, that the entries were not all made by Gray himself. The telegrams themselves were not introduced in evidence, nor was the operator at Pontiac, who sent the information concerning the trains at that place, called upon to testify in the case. It is very doubtful whether this evidence was admissible, but even if it were, being of a negative character, it could not have been so satisfactory to the jury as the testimony of witnesses who swore they were present and saw the trains obstructing the highways at the times mentioned. We can not say that the jury were not justified in finding that the allegations contained in the counts of the declaration, upon which they found defendant guilty, were sustained by a clear preponderance of the evidence. Instruction No. 3, given for the plaintiff, is as follows:

"If the jury believe from a clear preponderance of the evidence that the defendant, the Chicago & Alton Railroad Company, obstructed the several highways described in the declaration, or any one or more of them, by leaving a car or cars or a locomotive engine standing on its railroad track where said track intersects or crosses said several highways or any one of said highways, at the several times named in the several counts of the declaration, and for a period of more than ten minutes for each such obstruction, then defendant is liable," etc.

Counsel for appellant argue that this instruction is not correct, because it does not state the law to be, that persons desiring to cross the highway must have been actually prevented from so doing by reason of such obstruction before recovery can be had. It was held in *I. C. R. Co. v. The People*, 49 Ill. App. 540, that leaving a car on a railroad track at the intersection of a highway was not a violation of the statute in question, unless it was an obstruction of public travel. We do not understand that case to hold, however, that there must have been persons actually present, desiring to cross, who were prevented from doing so by reason of such obstruction, but only that the car or cars must have been so situated in reference to the highway

as to have presented an obstruction to persons desiring to cross, had there been any such persons there at the time. An instruction substantially similar to the one offered here, was approved by this court when the case above referred to came up the second time. (See I. C. R. R. Co. v. The People, 59 Ill. App. 256.) We think the instruction was properly given, but, in any event, it could have done no injury to appellant in this case, because there was the same evidence that there were persons at the streets desiring to cross at the time of the alleged several obstructions, that there was of the obstructions themselves.

The evidence in the case showed that the obstructions referred to in the fourth, fifth and sixth counts of the declaration, were caused at the same time by one train which extended across the three streets named in said counts. It is insisted on behalf of appellant that the obstruction of these three streets was in fact but one and the same act and constituted but one offense under the statute. The language of the statute is, "No railroad corporation shall obstruct any public highway by stopping any train," etc. The object of this statute is to prevent the obstruction of highways by railroad corporations in the manner named in the statute. We think it immaterial whether the obstruction is caused by one train extending across several highways or by several trains, one being at each highway crossing. In either instance the obstruction of each highway is, in our opinion, a separate offense under the statute.

The verdict of the jury, in this case, was as follows:

"We, the jury, find for the plaintiff for his debt the sum of \$120 on second, fourth, fifth, sixth, seventh and eighth counts."

It is claimed that the verdict was erroneous, because it found the debt in an aggregate sum. Counsel insist that the verdict should have been special as to the amount and not general; that a separate amount should have been named as damages in each count upon which appellant was found guilty.

In case of an indictment under the dram-shop act, for

the sale of intoxicating liquor contrary to law, containing several counts, it has been repeatedly held by our courts that the verdict should specify the counts upon which the accused was found guilty, and that judgment should be entered separately upon each of the same. In all the cases in our reports, where this rule has been announced, a prison sentence appears to have been inflicted, and it became necessary that the term of imprisonment should be specified under each count in order that each term, after the first, might commence at the expiration of the next preceding sentence. *Bolun v. The People*, 73 Ill. 488; *The People ex rel. v. Whitsun*, 74 Ill. 20; *Mullinix v. The People*, 76 Ill. 211; *Fletcher v. The People*, 81 Ill. 116.

In this case, however, the verdict specially designated the six counts upon which appellant was found guilty, so that difficulty was obviated. Where each count in a declaration under a penal statute is for a separate penalty, and the statute fixes a maximum beyond which the jury must not go, we are of opinion that it is the best practice for the jury to specify by their verdict the penalty they assess under each count upon which they find for the plaintiff, and that a gross verdict ought not to stand unless it clearly appears the jury did not under any count exceed the maximum penalty provided by law. But this case is a civil action in debt, and not a criminal prosecution. The rules applicable to civil rather¹ than to criminal cases apply, and the verdict should be sustained, unless there are informalities rendering it so uncertain that it is absolutely void.

The verdict in this case is not so uncertain that the intention of the jury can not be ascertained from it. The instruction as to the form of a verdict for plaintiff, given at the request of the plaintiff, directed the jury to assess in the aggregate not less than ten dollars nor more than one hundred dollars upon each and every count in the declaration found proven. As the jurors found against the defendant, we may fairly assume they would not assess under any count proven less than the lowest penalty directed. If we can assume they awarded at least ten dollars under each

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of the six counts under which defendant was convicted, then the total verdict of \$120 was not so large that it could have exceeded \$100 under any count.

We are therefore of opinion that the informality of the verdict was not of sufficient gravity to render the same void.

As we find no reversible error in the record in this case, the judgment will be affirmed.

F. F. Ide Mfg. Co. v. Sager Mfg. Co.

1. **CONTRACTS**—*Can Not be Varied by Parol Testimony*.—A contract in writing can not be varied or contradicted by parol testimony.

2. **SAME**—*Prior Contemporaneous Agreements*.—All prior and contemporaneous oral promises and agreements on the same subject-matter are merged in the written contract.

3. **CONSIGN**—*The Term Defined*.—"Consign," in mercantile law, is to send goods to an agent, commission merchant, correspondent or factor, to be sold, stored, etc.

Assumpsit, for goods consigned, etc. Trial in the County Court of Peoria County; the Hon. R. H. LOVETT, Judge, presiding. Finding and judgment for plaintiff; appeal by defendant. Heard in this court at the December term, 1898. Reversed April 11, 1899.

HAMMOND & WYETH, attorneys for appellant.

COVEY & COVEY, attorneys for appellee; DOW, WALKER & MARSH, of counsel.

MR. JUSTICE CRABTREE delivered the opinion of the court.

This was a suit brought by appellee against appellant to recover the price, or value, of 554 bicycle saddles. It appears from the evidence that appellee had sold appellant a large number of bicycle saddles, and on May 29, 1897, held appellant's note for \$426.10 then past due, and also had an open account against appellant. The latter then owned 554 bicycle saddles which it had purchased from appellee, fifty-four of which appellant had in store in Peoria, where

it did business, and the other five hundred were in the hands of an agent of appellee in Chicago. These bicycle saddles had all been manufactured by appellee for appellant, and were marked or stamped with the latter's name, "Ide." On the date above mentioned, an agent of appellee (who was also an attorney at law) visited appellant at Peoria, pressing for payment of said note and account, which it appears appellant was then unable or unprepared to make. After some conference and negotiation between the agent and appellant's officers an agreement was dictated, written out and signed by the agent of appellee, the original left with appellant, and a copy thereof transmitted to appellee soon thereafter. The contract so signed was as follows:

"PEORIA, ILLINOIS, May 29, 1897.

SAGER MFG. CO., Rochester, N. Y.

GENTLEMEN: Received from the F. F. Ide Mfg. Co. check for \$176.10 and 554 saddles, allowing them a credit of \$1.65 for each saddle, in full of note for \$426.10, and open account to date, and we hereby agree to consign said 554 saddles to the F. F. Ide Mfg. Co., and bill the same to them at \$1.65 per saddle, the said F. F. Ide Mfg. Co. to report on the first of each and every month thereafter, on the saddles taken from said lot as consigned, and to pay us on the first of each month for the saddles they have used from said lot.

Yours very truly,

SAGER MFG. CO.,

By DOW, WALKER & WALKER, Agents and Attorneys.
Dictated."

The contention in this case arises as to the proper construction to be placed on the above contract. On the part of appellant it is contended that all other and prior accounts and dealings of the parties as to the 554 bicycle saddles were merged in the new agreement, and that thereafter appellant was to receive the saddles as a consignment, to be sold and accounted for by it only as sold. On the other hand, appellee insists the agreement amounted to a sale of the whole lot of 554 saddles and claimed the right to show by parol proof that such was the intention of the parties. Against the objection of appellant the court permitted such parol proof, tending to support this contention of appellee. In this we think there was manifest error. The effect of

such proof was to change the contract from one of consignment only to that of an absolute sale. Under well known rules of law this can not be permitted. We are of the opinion the legal meaning of the contract was that the saddles were sold back to appellee, who received them and a check for \$176.10 in full of its note and open account against appellant. That appellee agreed to consign said 554 saddles to appellant and to bill them to it at \$1.65 per saddle, and that appellant would report on the first day of each month thereafter the number of saddles they had used during the preceding month, and would then pay appellee for the saddles so used. "To consign" is "to deposit with another to be sold, disposed of or cared for, as merchandise or movable property." (Standard Dict., title, Consign.) "Consign," in mercantile law, is "to send goods to an agent, commission merchant, correspondent or factor, to be sold, stored," etc. (Rapalje & Lawrence's Law Dict., title, Consign.) By virtue of this written contract, the title to the bicycle saddles became vested in appellee, who thereafter remained the owner thereof, subject to the right of appellant to sell the same and account for the proceeds. It appears from the evidence that appellant was unable to sell any of the saddles, and in fact sold none. On two different occasions before this suit was brought appellant notified appellee it could not sell them, giving the reason why, and that it held the fifty-four saddles subject to appellee's order. Appellee sued for the price of the 554 saddles, and in the court below, a jury being waived, recovered a judgment for \$914.10. A motion for a new trial was overruled and this appeal taken.

Without the oral testimony, which we hold was erroneously admitted, appellee clearly had no cause of action, and the judgment must be reversed. There was no error in refusing the proposition of law submitted by appellant. It was not requested until after the court had decided the case, as appears by the bill of exceptions, and hence it came too late.

But for the reasons given the judgment will be reversed.

VOL. 82.] Sterling Natl. Bank v. Union Dist. Number One.

Sterling National Bank v. Union District Number One.

Appeal, from the Circuit Court of Whiteside County; the Hon. FRANK D. RAMSEY, Judge, presiding. Judgment against plaintiff for costs; plaintiff appeals. Heard in this court at the December term, 1898. Affirmed. Opinion filed April 11, 1899.

A. A. WOLFERSPERGER and F. E. ANDREWS, attorneys for appellant.

WHITE & SHELDON and C. L. SHELDON, attorneys for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

The facts in this case are substantially the same as those in the case of the First National Bank of Sterling v. Union District No. 1, etc., *ante*.

The orders sued upon in this case were issued at the same time and under the same circumstances as those issued in the case referred to, and therefore the decision in that case must govern this, and the judgment will be affirmed.

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